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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 160.

MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK AND UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFFS IN ERROR,

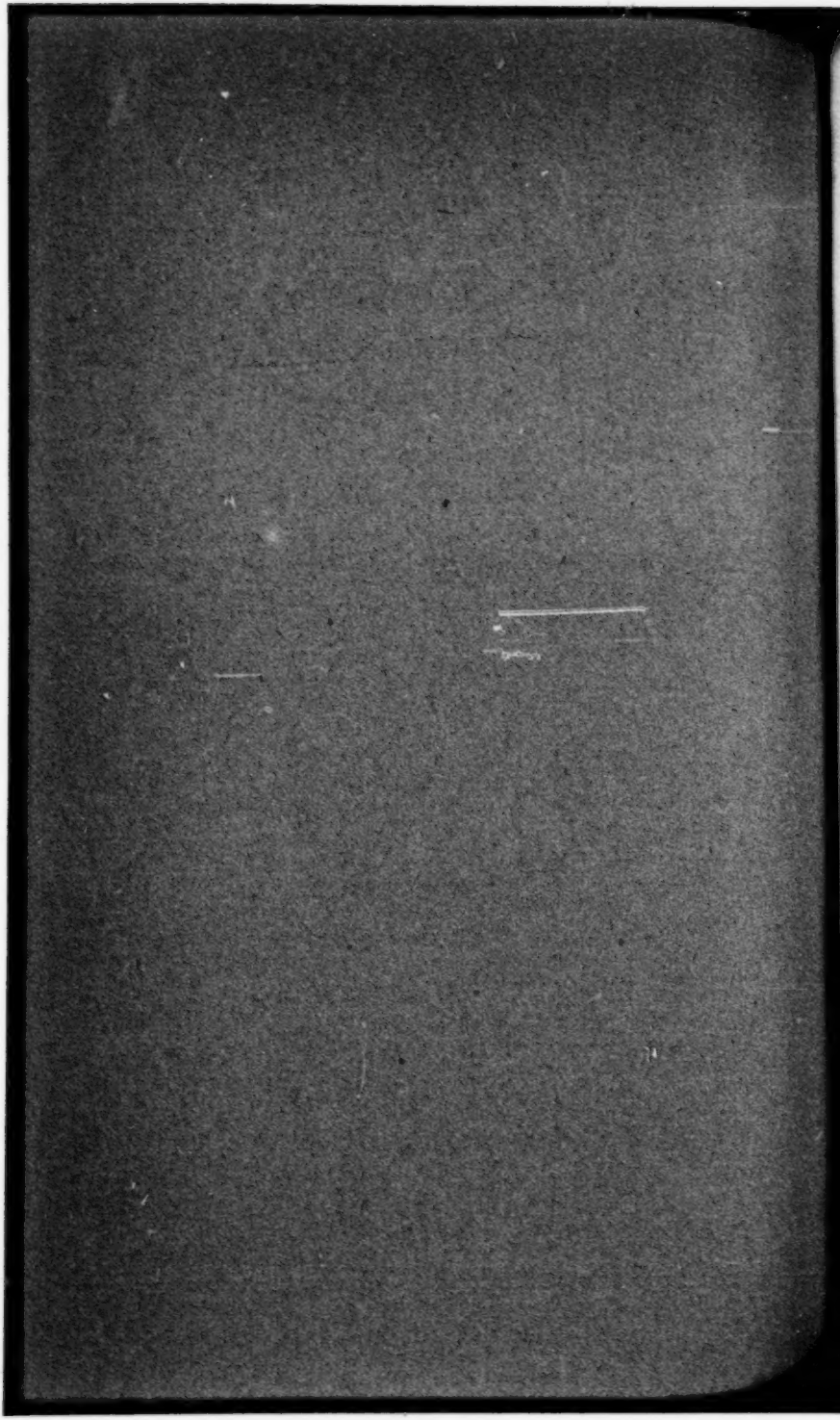
vs.

DAVID COHEN, INDEPENDENT EXECUTOR OF THE ESTATE OF JACOB COHEN, DECEASED.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED JANUARY 8, 1913.

(23,001)



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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 7, 1913.

1 Caption.

STATE OF TEXAS,
County of Harris:

At a term of the District Court begun and holden at Houston, Texas, within and for the County of Harris before the Honorable Charles E. Ashe, Judge of the 11th Judicial District Court in and for said County on the 30th day of June, A. D., 1910, and which Term is still in session the following cause came on for trial, to-wit:

No. 45,742.

DAVID COHEN, Executor,
vs.
MANHATTAN LIFE INSURANCE COMPANY.

2 *Plaintiff's First Amended Original Petition.*

(Filed Nov. 11th, 1908.)

In 11th Judicial District Court of Harris County, Texas, October Term, 1908.

No. 45,742.

DAVID COHEN, Executor,
vs.
MANHATTAN LIFE INSURANCE COMPANY et al.

Now come David Cohen, Independent Executor of the Estate of Jacob Cohen, deceased, plaintiff, after leave of Court first had and obtained and files this his first amended original petition in lieu of his original petition filed herein on May 15th 1908, and complaining of the Manhattan Life Insurance Company, defendant respectfully represents:

1. That the plaintiff resides in Harris County, Texas, and is the duly appointed, qualified and acting Executor of the last will and testament of Jacob Cohen, deceased, under order and decree of the Probate Court of Galveston County, Texas, made and entered on November 18th, 1907, without bond or other security, and without other proceeding in or supervision by said probate court, than taking and filing the required oath and filing an inventory, appraisement and list of claims of said estate;

That the said Manhattan Life Insurance Company is a corporation duly organized and chartered under and by virtue of the laws of the State of New York, having its principal office and principal place of business in the City, County and State of New York, of which corporation Henry B. Stokes is President and J. H. Griffin is Secretary, each of whom reside in said City, County and State of New York,

and that said corporation is chartered for the purpose of insuring the lives of individuals against death, among other things, and has duly qualified, and was duly qualified, upon the days and dates hereinafter stated, to transact its said business within the State of Texas; that it has a local agent in the City of Houston, Harris County, Texas, who holds a power of attorney from it, to-wit: upon whom service of citation in this suit may be had, and same may
3 also be had upon Honorable Thos. B. Love, Commissioner of Insurance of the State of Texas, who resides at Austin, in Travis County, Texas, under the terms and provisions of the General Laws of the State of Texas and the power of attorney of the said defendant, on file in said office of Commissioner of Insurance.

2. That heretofore to-wit: On or about the 7th day of April 1893 for and in consideration of the applications, and the statements and covenants therein contained, and of annual premiums of $122.25 paid and to be paid by Jacob Cohen thereafter on the 7th day of April in every year during twenty years, the said Manhattan Life Insurance Company executed, issued and delivered to him two certain policies of insurance dated April 7, 1893, numbered 84873 and 84874 respectively, wherein and whereby it is was contracted and agreed by it among other things, that the said defendant would pay to said Jacob Cohen, of Galveston, in Galveston County, Texas, his executors, administrators or assigns $3750.00 (on each policy) upon satisfactory proof at its office of the death of said Jacob Cohen during the continuance of said policies before the 7th day of April 1913, which said contracts and policies of insurance were subsequently changed by the parties by written endorsement thereon dated August 27, 1894 by providing among other things for the payment of an annual premium of $124.88 instead of the sum heretofore named, a copy of which said policy or contract No. 84873, with said endorsement thereon, is hereto attached, marked Exhibit "A", and the same is referred to and made a part of this petition as fully as if copied herein; and said policy or contract No. 84874 was for the same amount and of like date, tenor and effect, with the same endorsement thereon, and the originals of said two policies or contracts of insurance are now in the possession of the defendant, and it is here now notified to have and produce the same upon the trial of this cause, otherwise secondary evidence of the contents thereof will be
4 offered by plaintiff.

That said Jacob Cohen during his life time, paid all premiums becoming due under the terms of said policies of insurance and endorsement as aforesaid and that he departed this life on or about the 11th day of October A. D. 1907, in the city of Houston, Harris County, Texas, and that at the time of his death all annual premiums due on or under said policies or contracts had been fully paid, and said policies were in full force and effect.

That at the time of the death of said Jacob Cohen the plaintiff had no personal knowledge of the existence of said policies of insurance, and that as soon as plaintiff discovered the existence of the same, he within two years after such death, on to-wit: the 10th day of April 1908, on behalf of said estate, filed with said defendant proofs of death and complied with all other provisions of said pol-

icies of insurance, with reference to proofs of loss, and that the same were received and accepted by the said defendant, and that it made no objection to the manner or form or date of proof, or any other objection, but admitted a full compliance with all the requirements of said policies, with reference to proofs of loss, etc., and admitted the validity of said policies, and that same were in full force and effect at the time of the death of said Jacob Cohen.

That by reason of such execution, issuance and delivery of said policies of insurance, payable of all annual premiums, death of Jacob Cohen, and furnishing of proofs of death within two years after such death as aforesaid the defendant became liable and promised to pay to the plaintiff as such executor, the sum of $7,500.00 together with interest thereon at 6% per annum from the 11th day of October 1907.

3. That is was provided in said policies of insurance, that
5 said sums of $3,750.00 upon each of said policies would be paid by it upon satisfactory proof of the death of said Jacob Cohen as aforesaid, and that said proof of death, satisfactory in all respects to it, as aforesaid, was given to it on or about the 10th day of April 1908 together with proof that plaintiff was such executor, and said defendant being satisfied with all such proof and admitting its sufficiency, and admitting that said policies were valid and in full force and effect, nevertheless failed and refused to pay the same or any part thereof, to this plaintiff, although the same were then under the terms and provisions of said policies of insurance, immediately due and payable; wherefore said defendant became liable to pay plaintiff 12% damages on the amount of $7,500.00 to-wit: $900.00.

4. That by reason of the failure and refusal of said defendant to pay the amounts due on said policies of insurance as aforesaid, plaintiff as executor has been compelled to employ attorneys to prosecute and collect the same, towit, Hunt, Myer & Townes and has become liable and promised to pay them the reasonable value of their services; that their services will be and are reasonably worth the sum of $1000.00 which said sum the defendant has also become liable and promised to pay the plaintiff as executor.

5. That by reason of the premises, the defendant has become liable and promised to pay plaintiff executor the sums of money hereinbefore stated, towit: $7500.00 with 6% interest from — day of October, 1907, to trial of this suit $900.00 damages and $1000.00 attorneys' fees, but to pay the same or any part thereof, though thereunto often requested so to do, the said defendant has wholly failed and refused to plaintiff's damage in the sum of $12,000.00.

Wherefore, premises considered, plaintiff prays that defendant be cited and served to answer this suit, as required by law, and
6 that upon a final hearing hereof, that he, as executor, do recover judgment against said defendant for his said debt, damages, attorneys' fees, interest and costs of court, and for such other and further relief as he may be entitled to receiver under the pleadings and proof, either at law or in equity, both special and general, and in duty bound will ever pray.

HUNT, MYER & TOWNES,
Attorneys for Plaintiff.

(Copy.)

Sum Insured, $3750. Annual Premium, $122—25/100.

NEW YORK, *April 7th*, 1893.

No. 84873.

The Manhattan Life Insurance Company of New York.

In consideration of the application for this Policy, and the statements and covenants therein contained, which are a part of this contract and of the annual premium of One Hundred and Twenty Two 25/100 Dollars to be paid in advance to the Company at its office in the City of New York on the delivery of this policy, and thereafter on the seventh day of April in every year during twenty years' Insurance the life of Jacob Cohen of Galveston in the County of Galveston and State of Texas and will pay at its said office in the City of New York to Jacob Cohen, his executors, administrators or assigns, Thirty Seven Hundred and Fifty Dollars at its said office on the death of the insured during the continuance of this Policy before the seventh day of April, 1913, or Eighteen Hundred
7 and Ninety Dollars and the accumulated dividends on this Policy upon the surrender of the Policy or the accumulated dividends without the surrender of the policy on that day, or Thirty Seven Hundred and Fifty Dollars and the accumulated dividends on satisfactory proof of death as aforesaid on or after the seventh day of April 1913 upon the following conditions:

I. If any statement made in the application be in any respect untrue, or if any premium be not paid when due, or if the insured engage in any naval or military service except in the militia not in actual service, this Policy shall be void and all payments made upon it shall be forfeited to the Company; except that, after being in force three full years, this Policy shall be incontestable for any misstatement in the application except as to age and if it shall lapse or become forfeited for the non-payment of any premium the Company will pay as many 20ths of said sum of Thirty Seven Hundred and Fifty Dollars at the time and place mentioned for its payment, as there have been annual premiums paid on this Policy.

II. Proof of death shall be furnished to the Company within two years after death, and no suit shall be brought against the Company on this Policy after two years from the time when the cause of action accrues.

III. No provision of this contract can be changed or waived except by a written agreement, signed by the President or Secretary of the Company.

H. [SEAL.] In Witness whereof, The Manhattan Life Insurance Company has hereunto affixed its Corporate Seal and by its President and Secretary assigned and delivered this

contract at the City of New York this 7th day of April one thousand eight hundred and ninety three.

8 (Signed) H. B. STOKES, *President.*
(Signed) J. H. GRIFFIN, JR.,
Ass't Secretary.

"Exhibit A."

"Endorsements on Back."

No. 84,873. The Manhattan Life Insurance Co. of New York. Life of Jacob Cohen. $3,750. Annual Premium, $122.25/100. Dated April 7th, 1893.

The within named Jacob Cohen having declared that the date of his birth as stated in the application on which this Policy was issued is incorrect and that the correct date is May 4, 1860, Now on the faith of these statements the annual premium hereon is changed to 124-88/100 Dollars to conform thereto and the amount payable on the seventh day of April 1913 will be 1935-00/100 instead of 1890-00/100 as expressed in the within policy.

New York, August 27, 1894.
(Signed) W. C. FRAZEE, *Sec'y.*

Filed Nov. 11th, 1808. Henry Albrecht, Clerk District Court Harris County, Texas. By Frank H. Meyer, Deputy.

9 *First Amended Original Answer of Manhattan Life Insurance Company.*

(Filed Apr. 14th, 1909.)

In 11th Judicial District Court, Harris County, Texas.

No. 45742.

DAVID COHEN, Executor,
vs.
MANHATTAN LIFE INSURANCE COMPANY et al.

First Amended Original Answer of Defendant Manhattan Life Insurance Company.

Now comes defendant Manhattan Life Insurance Company and leave of court files this its first amended original answer in amendment of and substitution for its original answer filed herein on the 28th day of October 1908.

Said defendant demurs to plaintiff's petition and says that the same is insufficient in law, of which defendant prays judgment of the court.

For further answer said defendant denies, all and singular the allegations of plaintiff and of this it puts itself upon the Country.

For further and special answer said defendant pleads as follows:

1.

That said defendant is not indebted to plaintiff by reason of the facts hereinafter alleged.

2.

On April 7, 1893, Jacob Cohen resided in Galveston County, Texas, and the Manhattan Life Insurance Company was then, as it still is, a life insurance corporation duly incorporated under the laws of the State of New York. On said date April 7, 1893 it was doing a life insurance business in Texas under a proper license. It was not doing or licensed to do business in Texas, when this
10 suit was filed on May 15, 1908, but about July 1, 1908, it was again licensed to do and is now doing business in Texas as a life insurance company.

3.

On April 7, 1893, said Insurance Company issued to Jacob Cohen two policies of insurance on his life for $3,750.00 each, payable, in case of his death, and subject to various provisions therein stated, to his executors, administrators or assigns, being the two policies upon which this suit is brought. Said policies were numbered respectively, 84,873 and 84,874. A copy of said policy No. 84,873, with a subsequent endorsement thereon, is attached hereto, marked "Exhibit A" and the same is made a part of this answer and it is hereby referred to for greater particularity.

Said policy No. 84,874, was for the same amount and of like date, tenor and effect, and the same was endorsed in like manner. Said endorsements were authentic, valid and in accordance with the facts.

4.

Jacob Cohen died in Harris County, Texas, on October 11, 1907. Said policies were then in full force and effect, subject to whatever rights the insurance company had under the loans thereon as hereinafter stated, and also subject to whatever rights J. H. Hilsman may have had under the facts hereinafter stated.

Jacob Cohen was a resident citizen of Bexar County Texas, at the time of his death.

5.

Said Jacob Cohen left a will appointing David Cohen independent executor of his estate. Prior to the institution of this suit said will was duly probated in Galveston County, Texas, and said David Cohen duly qualified and is now acting as independent execu-
11 tor of said estate.

6.

Prior to July 15, 1907 said Jacob Cohen borrowed from said insurance company two sums of $875.00 each, each sum being secured by a pledge of one of said policies, and at the time of Jacob Cohen's death there was due said insurance company on both of said policies the sum of $1,750.00, which sum was a valid charge against said policies and a proper credit on the amount of the same, said amount being $3,750.00 each or a total of $7,500.00, the balance owing by said insurance company on both said policies at the date of Jacob Cohen's death being $5,750.00.

7

By instruments dated July 15, 1907, said Jacob Cohen assigned said policies to J. H. Hilsman. A copy of the assignment of said policy No. 84,873, is hereto attached, marked "Exhibit B" and the same is made a part of this answer and is hereby referred to for greater particularity.

The assignment of policy No. 84,874 was of the same date and of like tenor and effect.

In connection with the said assignments said Jacob Cohen also executed to said Hilsman and an order on said life insurance company to deliver said policies upon the payment of said $1,750.00 loan. A copy of said order is hereto attached marked "Exhibit C".

At the time of said purported assignments Jacob Cohen resided in San Antonio, Texas. J. H. Hilsman resided in Atlanta, Georgia, and Hilsman, had an agent in San Antonio, Texas, through whom the negotiations for the transaction were begun, and the transaction itself definitely agreed upon, the agreement being that Hilsman would pay Jacob Cohen $460.00 for his equity in said policies, whereupon Cohen wired Hilsman to send papers, and the following correspondence, by letter and telegram, passed between them:

12 ATLANTA, GA., JULY 11, 1907.

Mr. Jacob Cohen, P. O. Box 282, San Antonio, Texas.

DEAR SIR: In accordance with your wire of this morning we are herewith enclosing to you one set of assignment papers for Policy #84,873, and one set of assignment papers for Policy #84,874 which you will please execute as below instructed:

1. Sign your full name just as it is written in the Policy, on each of the six papers.

2. Your signature must be witnessed on each of the papers by a Notary Public, he using his seal on each.

3. Enclose the last Premium Receipts for each of the Policies.

4. Sign the enclosed Order to the Company to deliver the Policies to us upon payment to them of the loan.

5. Copy of the loan agreement to you from the Company must be enclosed, so that we can have official evidence that the Beneficiary is your estate, and that no one else has any equity in the Policy.

6. Send all the papers, that are herewith enclosed, duly executed in a sealed envelope, with this draft attached, and upon arrival if in good shape—we will duly honor.

Very truly yours, (Signed) J. H. HILSMAN.

(8 Enclosures.)

SAN ANTONIO, TEXAS, July 13, '07.

Messrs. J. H. Hilsman Company, Atlanta, Ga.

13 DEAR SIRS: Yours of the 11th to hand. I have all the papers required of you with the exception of the loan agreement; but I hold the Company's receipt for the policies as collateral security for the loan and I have a copy of the Policy. There is no other beneficiary except my estate. I am not married and my policies are made payable to me, my executors or estate. I shall attach both receipts to the other documents, and if this meets with your approval please wire me upon receipt of this letter and I shall forward papers.

Yours truly, (Signed) JAKE COHEN.

Copy Telegram Sent by "Postal" Company.

JULY 15, 1907.

Jake Cohen, Cotton Merchant, San Antonio, Texas.

Forward draft and papers.

(Signed) J. H. HILSMAN.

ATLANTA, GA., July 15*th*, 1907.

Mr. Jake Cohen, Cotton Merchant, P. O. Box 2828, San Antonio, Texas.

DEAR SIR: In answer to your favor of the 13th inst. you may forward the papers sent to you in ours of the 11th duly executed
14 as per our instructions, and on arrival we will promptly honor the draft, provided the papers are in good shape. We confirmed the above by wire this morning.

Thanking you and awaiting your further commands, we are

Very truly yours, (Signed) J. H. HILSMAN.

SAN ANTONIO, TEXAS, *July* 15, 1907.

Messrs. J. H. Hilsman Co., Atlanta, Ga.

DEAR SIRS: Your message to hand and I beg to enclose all documents relatings to the transfer to my two life insurance policies 84873 and 84874 in the Manhattan Life Insurance Company, all of which I trust you will find correct and will honor my draft for $460.00 attached to these documents.

Thanking you very much, I am,

Yours very truly,

(Signed) JAKE COHEN.

Accordingly, on July 15, 1907, said Jacob Cohen signed and acknowledged said purported assignments and signed said order on the insurance company and attached the same to a bank draft on Hilsman for $460.00 and deposited said draft in San Antonio for collection and the same was paid by Hilsman on presentation to him in Atlanta, Georgia, on July 19, 1907, and said assignments were then and there delivered to Hilsman with said draft J. H. Hilsman
was not related to Jacob Cohen, nor was Cohen in debt to
15 him, unless it should be by reason of the facts above stated,
nor did Hilsman have any interest in the life of said Cohen, other than this transaction.

8.

Said Jacob Cohen, Hilsman and his said agent were engaged in speculative transactions, and said assignments were made as a part of and in connection with a certain transaction in what is commonly called "cotton futures," the money being paid to and received and used by Jacob Cohen to speculate in the future price of cotton, without its being contemplated that there would be actual delivery thereof, or bargain and sale, the said Hilsman or his said agent, being interested in the transaction, and the purpose of the transaction being known by all the parties, which purpose was carried into effect, through the said agency of J. H. Hilsman and J. H. Hilsman he being engaged in the brokerage business.

9.

On April 10, 1908, the insurance company received from both claimants, Hilsman and David Cohen, Executor, proofs of death in proper form, to which no objection was made. Each claimant objected to the insurance company paying the other. Hilsman advised the insurance company that he claimed the right to receive the face of the policies less said $1,750.00 loan. Plaintiff, David Cohen, Executor, advised the insurance company that he also claimed the right to receive the face of said policies less the amount of said loan, on the ground that Hilsman had no insurable interest, that the assignments to him were illegal and void for that reason and also for the reason that said assignments were part of a gaming transaction as hereinbefore set out. The insurance company admitted liability for the face of the policies, less the amount of said
loans, and offered to pay the same to the joint order of the
16 rival claimants, or to pay the money into court if the matter
could be so arranged that the parties would appear and interplead in a court of competent jurisdiction where any judgment that might be rendered would fully protect the insurance Company from double liability.

Said claimants failing to reach any agreement, on May 6, 1908, Hilsman gave to said insurance company a satisfactory indemnity bond, and the insurance company paid to Hilsman the sum of $5,750.00 being the full face of said policies, less the amount of

said loans and said policies were thereupon receipted in full by Hilsman and surrendered to the insurance company.

Before paying said policies to Hilsman the insurance company had notice that plaintiff, David Cohen, claimed that said assignments were invalid, as aforesaid, and that plaintiff was entitled to recover thereon, but the payment was made because the insurance company was advised that Hilsman was entitled to collect the same and that in any event, the aforesaid indemnity would protect it and because it was advised that it was not practicable to secure a determination of the controversy in a suit where the court would have proper and sufficient jurisdiction of all the parties and the subject matter. It was not the purpose of the insurance company to contest or delay payment, and the payment of Hilsman was made under the circumstances above set out.

Hilsman has not been repaid said sum of $460.00 and the insurance company has not been repaid the amount of said loan, except as above stated.

10.

Defendant alleges that under the laws of the States of New York and Georgia, during the times of the transactions involved in this suit, said assignments from Cohen to Hilsman were legal and valid, and vested in Hilsman the legal and equitable title to said policies, with the right to receive and collect the same for his own use
17 and benefit subject only to the lien of said insurance company to secure the payment of said loan. Said insurance policies were New York contracts and said assignments thereof were Georgia contracts, under the facts hereinbefore set forth. Under the law the State of Georgia, during the period covered by the transactions in this suit, a valid life insurance policy is like other choses in action, assignable in law and in equity, although the assignee have no insurable interest in the life of the insured except by virtue of such assignment.

11.

Defendant says that in any event it acted in good faith in making said payments to Hilsman, who was the legal owner of said policies, that defendant did not refuse to pay said policies after demand, and therefore that it is not liable for damages, penalties, interest or attorney's fees, and that if plaintiff has any cause of action the same is against said Hilsman and not against said insurance company, all of which the defendant is ready to verify.

W. J. MORONEY,

Attorney for Defendant Manhattan Life Insurance Company.

EXHIBIT "A."

Copy of Policy.

Sum Insured, $3750.00. Annual Premium, $122.25/100.

NEW YORK, *April 7th*, 1893.

No. 84873.

The Manhattan Life Insurance Company of New York in consideration of the application for this policy, and the state-
18 ments and covenants therein contained which are a part of this contract and of the — annual premium of One hundred and twenty two 25/100 Dollars to be paid in advance to the Company at its office in the City of New York on the delivery of this Policy, and thereafter on the seventh day of April in every year during twenty years insures the life of Jacob Cohen of Galveston in the County of Galveston and State of Texas and will pay at its said office in the City of New York to Jacob Cohen, his executors, administrators or assigns Thirty Seven Hundred and Fifty Dollars upon satisfactory proof at its said office of the death of the insured during the continuance of this Policy before the seventh day of April, 1913, or Eighteen hundred and ninety three Dollars and the accumulated dividends on this Policy upon the surrender of the Policy on that day or Thirty seven hundred and fifty Dollars and the accumulated dividends on satisfactory proof of death as aforesaid on or after the seventh day of April 1913 upon the following conditions:

I. If any statement made in the application be in any respect untrue, or if any premium be not paid when due, or if the insured engage in any naval or military service except in the militia not in actual service, this Policy shall be void and all payments made upon it shall be forfeited to the Company except that, after being in force three full years, this Policy shall be incontestable for any misstatement in the application except as to age and if it shall lapse or become forfeited for the non-payment of any premium the Company will pay as many 20ths of said sum of Thirty seven hundred and fifty Dollars at the time and place mentioned for its payment as there have been annual premiums paid on this Policy.

II. Proof of death shall be furnished to the Company within two years after death, and no suit shall be brought against the Com-
19 pany on this Policy after two years from the time when the cause of action accrues.

III. No provision of this contract can be changed or waived except by a written agreement signed by the President or Secretary of the Company.

II. In witness whereof The Manhattan Life Insurance Company has hereunto affixed its Corporate Seal and by its President and Secretary signed and delivered this contract at the City of New

York, this seventh day of April one thousand eight hundred and ninety three.

(Signed) J. H. GRIFFIN, Jr.,
Ass't Secretary.

(Signed) H. B. STOKES, *President.*

Endorsements on back: No. 84873. The Manhattan Life Insurance Company of New York. Life of Jacob Cohen. $3,750. Annual Premium, $122.25/100.

The within named Jacob Cohen having declared that the date of his birth as stated in the application on which this Policy was issued is incorrect, and that the correct date is May 4, 1860. Now on the face of these statements the annual premium hereon is changed to 124-88/100 Dollars to conform thereto and the amount payable on the seventh day of April 1913, will be 1935.00/100 instead of 1890.00/100 as expressed in the within policy.

New York, August 27, 1894.

(Signed) WM. C. FRAZEE, *Sec'y.*

EXHIBIT "B."

Bill of Sale.

Know all men by these presents, That — Jacob Cohen, party of the first part, for and in consideration of the sum of one dollar ($1) lawful money of the United States, to me in hand paid, at or before the ensealing and delivering of these presents by J. H. Hilsman party of the second part, the receipt whereof is hereby acknowledged have bargained and sold, and by these presents do bargain, grant sell and convey unto the said party of the second part, his, hers, its or their successors, heirs, executors, administrators or assigns forever, policy No. 84873 in the Manhattan Life Insurance Company of New York with all right, title and interest in and to the same in case of death of the insured and to the same in case of surrender or maturity of said policy.

To have and to hold the same unto the said party of the second part, his, hers, its or their successors, heirs, executors, administrators or assigns forever, and I do for my heirs, executors and administrators, covenant and agree to and with the said party of the second part to warrant and defend the sale of the said policy of insurance hereby sold unto the said party of the second part, his, hers, its or their successors, heirs, executors, administrators or assigns against all and every person whomsoever.

In testimony whereof I have hereunto set my hand and seal the fifteenth day of July in the year nineteen hundred and seven.

Sealed and delivered in the presence of

(Signed) JACOB COHEN.

STATE OF TEXAS,
County of Bexar:

Be it known, that on the 15 day of July A. D. 1908, before me Clinton G. Brown, a Notary Public in and for said County, in the State aforesaid, duly commissioned and sworn, dwelling in the City of San Antonio personally came and appeared Jacob Cohen personally known to me to be the same person described in and who executed the foregoing instrument and he to me acknowledged the same to be his free act and deed.

21 In testimony whereof, I have hereunto subscribed my name, and affixed my seal of office the day and year last above written.

(Signed) CLINTON G. BROWN,
[SEAL.] *Notary Public.*

Assignment of Policy with Power of Attorney.

Know all men by these presents, That I, Jacob Cohen of San Antonio in the County of Bexar and State of Texas the assured, and the beneficiar- under a certain policy of life insurance issued by the Manhattan Life Insurance Company upon the life of Jacob Cohen for the sum of Thirty Seven Hundred Fifty dollars and numbered 84873, dated April 7th, 1893, in consideration of the sum of one dollar and other valuable considerations to me paid in hand, by J. H. Hilsman, whose post office address is Atlanta, Ga. the receipt whereof is hereby acknowledged, do hereby assign, transfer and set over unto the said J. H. Hilsman the said policy of insurance with all the privileges, benefits, surplus, dividends, profits due or to become due thereon, and advantages secured to us or either of us or to be had or derived therefrom. To have and to hold the same unto the said assignee, his, hers, its or their successors, heirs, executors, administrators and assigns forever.

And I or we do hereby fully authorize and empower the said assignee, his, hers, its or their successors, heirs, executors, administrators and assigns to surrender said policy at any time, at or before its maturity, for its cash value as the same may be determined by said insurance company at the time of such surrender and to give such company a valid and sufficient receipt therefor in the form required by said company, which receipt I or we hereby covenant, promise and agree shall be binding upon us and each of us and upon the heirs, executors and administrators of each of us.

22 And more fully to accomplish and effectuate the purpose of this assignment I or we do hereby make, constitute and appoint the said assignee my or our attorney, irrevocable, with full power of substitution and revocation, in my or our name or otherwise, to take all proceedings in my or our name and stead, but to his use, to ask, demand, levy, require, recover and receive of and from the said Insurance Company or Society all and singular the sum and sums of money which shall and may be found due, owing,

payable, belonging, and coming unto us, or either of us the constituents by any means whatsoever for, by or on account of the above-named contract of insurance or endowment whether by death or act of the insured, or maturity under its terms, and to endorse in my or our name any check, draft or other paper given in payment for or liquidation of said claim.

And I or we further hereby declare that the said policy belongs to us, that it is free and clear from all liens and encumbrances, that I or we have made no other transfer or assignment thereof, nor any power of attorney to collect the same that has not been legally released or revoked, that is affected by no proceedings in bankruptcy or insolvency instituted by or against us or either of us since the issue of the aforesaid policy, that I or we have good right, full power and lawful authority to assign the same in the manner aforesaid, and that I or we will at any time hereafter at the request of said assignee, his, hers, its, or their successors, heirs, executors, administrators, or assigns, make, do execute, or procure, to be made, done, or executed such reasonable assurances, acts, and instruments for the more effectual confirmation of this assignment as may be requested by him, or them, and their title to the said policy will forever warrant and defend, and that the said assignee has by the value paid to the said Jacob Cohen an insurable interest in the life insured as represented by said contract of insurance to an amount equal to its greatest value under any circumstances.

23 In witness whereof, I have hereunto and to a duplicate hereof set my or our hand and seal this fifteenth day of July in the year of our Lord nineteen hundred and seven.

[SEAL.] (Signed) JACOB COHEN.

Signed, sealed and delivered in presence of

—— ——.

STATE OF TEXAS,
County of Bexar:

Be it known, That on the 15th day of July, A. D. 1907, before me Clinton G. Brown, a Notary Public in and for the said County, in the State aforesaid, duly commissioned and sworn, dwelling in the City or Town of San Antonio personally came and appeared Jacob Cohen to me personally known, and known to me to be the person described in, and who executed the foregoing instrument, and he to me acknowledged the same to be his free act and deed.

And the said —— —— on a private examination by me held separate and apart from her said husband acknowledged to me that she executed the same freely, and without any fear or compulsion of her said husband.

In Testimony Whereof, I have hereunto subscribed my name, and affixed my seal of office, the day and year last above written.

(Signed) CLINTON G. BROWN.

"EXHIBIT C."

SAN ANTONIO, TEXAS, *July* 15, 1907.

The Manhattan Life Insurance Co., New York City.

GENTLEMEN: Upon payment to you the $1750.00 loan
24 you will please deliver to the bearer on demand policies #84873 and #84874.

(Signed) JACOB COHEN.

(Signed) CLINTON W. BROWN,
Witness.

Filed Apr. 14th, 1909. Henry Albrecht, Clerk District Court Harris County, Texas, by Frank H. Meyer, Deputy.

Plaintiff's First Supplemental Petition.

(Filed Apr. 14, 1909.)

In the 11th Judicial District Court of Harris County, Texas.

No. 45742.

DAVID COHEN, Executor,
vs.
MANHATTAN LIFE INSURANCE CO. et al.

Now comes the plaintiff, with leave of the court first had and obtained, and files this his first supplemental petition in replication and answer to the first amended original answer of the defendant, Manhattan Life Insurance Co., and for answer:

Demurs and excepts generally to said first amended original answer and says the same is insufficient in law to show any defense to the plaintiff's cause of action, and of this he prays the judgment of the court and for costs.

II.

Answering herein, in the event that the foregoing demurrer be overruled the plaintiff denies all and singular the allegations in his said first amended original answer contained, and of this he puts himself upon the country.

III.

Further specially answering herein, the plaintiff says that
25 said alleged assignments of the policies of insurance sued upon herein are invalid and not binding upon it and were without legal consideration under the laws of the State of Texas, the State of New York, and the State of Georgia, for this, that at

the time that said assignments and each of them were made, executed and delivered, that the said Jacob Cohen, J. H. Hilsman and his said agent, were engaged in speculative transactions and that said assignments and each of them, were made as a part of and in connection with the said transactions, in what is commonly called "cotton futures," the money being paid to and received and used by the said Jacob Cohen to speculate in future prices of cotton without its being contemplated that there would be actual delivery thereof, or bargain and sale; the said Hilsman, and his agent being interested in the transaction and the purpose of the transaction being at and before the time known to and by all the parties which said purpose was carried into effect through the said agency J. H. Hilsman and J. H. Hilsman, he being engaged at that time in the brokerage business; all of which said facts were well known to the defendant Insurance Company at and before the time that it paid the said policies to the said Hilsman, as in its said answer alleged and set forth.

Wherefore said assignments were of no binding force and effect and the said Hilsman acquired no interest in or right to said policies of insurance, and the defendant, Insurance Company was not authorized or entitled to pay the same to the said Hilsman; all of which the plaintiff is ready to verify.

IV.

Further specially answering herein, plaintiff says that the defendant, Insurance Company, should not be allowed to have and maintain said defense pleaded by it, for this, that at the time of the execution and delivery of the said purported assignments
26 from the deceased, Jacob Cohen to J. H. Hilsman for the consideration of Four Hundred and Sixty Dollars ($460.00) that the said J. H. Hilsman was not related to the said Jacob Cohen, nor was the said Jacob Cohen in debt to the said J. H. Hilsman unless it should be by virtue of the fact of the payment of the said $460.00 for the purported transfer and assignment of said insurance policies, nor did said Hilsman at said time have any interest in the life of said Jacob Cohen other than the said transaction; all of which was well known to the defendant, Insurance Company, at the time said policies were paid to the said Hilsman as alleged and set forth in its said answer. That under and by virtue of the laws of the State of Texas, the State of New York and the State of Georgia, and each of them, an assignment of a life insurance policy to a person without insurable interest in the life of the insured, is invalid and not binding upon the assignor or his representative.

Wherefore the defendant, Insurance Company, should not be allowed to have and maintain said defense pleaded by it. Wherefore premises considered, this plaintiff prays that upon a final hearing hereof that it have judgment as prayed for in its first amended original petition less the amount of the loans made by the defendant, Insurance Company upon said policies of insurance, as pleaded by

it, and for such special and general relief as it may be entitled to receive under the pleading and evidence, both at law and in equity, and as in duty bound will ever pray.

HUNT, MYER & TOWNES,
Attorneys for Plaintiff.

STATE OF TEXAS,
County of Harris:

Before me, the undersigned authority, on this day personally appeared David Cohen, who being by me duly sworn, on oath deposed and said that the facts set forth and alleged in paragraphs
27 III and IV hereof are true, and that in his opinion the laws of the States therein pleaded are as therein set forth.

DAVID COHEN.

Sworn to before me and subscribed by David Cohen, this the 14th day of April, A. D., 1909.

HENRY ALBRECHT, *C. D. C. H. C.*,
By FRANK H. MEYER, *Deputy.*

Filed Apr. 14th, 1909. Henry Albrecht, Clerk District Court, Harris County, Texas. By Frank H. Meyer, Deputy.

Judgment.

(Recorded in Vol. 19, P. 285.)

#45742.

DAVID COHEN, Executor,
vs.
MANHATTAN LIFE INSURANCE COMPANY.

Be it remembered that on this the 30th day of June, A. D. 1910 came on in its regular order upon the docket to be heard, the above numbered and entitled cause, when came the plaintiff, David Cohen, in his capacity, as independent executor of the -state of Jacob Cohen, deceased, by his attorneys and announced ready for trial. And also came the defendant, Manhattan Life Insurance Company, by its attorney, W. J. Moroney, Esq., and announced ready for trial. And thereupon the plaintiff in open court dismissed his cause of action as against the defendant, J. H. Hilsman, for the reason that he is a non-resident of the State of Texas, and no jurisdiction had been or could be acquired over him.

No jury having been demanded, the matters of fact as
28 well as of law were submitted to the court. And the Court having heard the evidence and arguments of counsel, and being fully advised in the premises, is of the opinion that both the law and the facts are with the plaintiff.

And it appearing to the court that the defendant, Manhattan Life Insurance Company is justly indebted to the plaintiff, in the sum of Seventy Five Hundred ($7500.00) Dollars, and that the plaintiff's intestate at the time of his estate was justly indebted to the defendant Manhattan Life Insurance Company in the sum of Seventeen Hundred and Fifty ($1750.00) Dollars, which sum should be allowed as an offset against the said sum of $7500.00, leaving a total indebtedness of Fifty Seven Hundred and Fifty ($5750.00) Dollars with interest thereon from the 10th day of June 1908, at the rate of 6% per annum;

And it further appearing to the Court, that due demand had been made before the filing of this suit, upon the defendant Manhattan Life Insurance Company for the payment of the policies of insurance sued upon, and the plaintiff is entitled to recover the statutory penalty of 12% on said sum of $5750.00.

And it further appearing to the Court that the plaintiff in his capacity as Executor is entitled to recover of and from the defendant Manhattan Life Insurance Company, his judgment for his reasonable attorney's fees incurred herein, and that the sum of Seven Hundred ($700.00) Dollars is a reasonable attorney's fee in this cause.

It is therefore considered by the court so ordered, adjudged and decreed, that the plaintiff, David Cohen, in his capacity as independent executor, under the will of Jacob Cohen, deceased, do have and recover of and from the Manhattan Life Insurance Company, a corporation duly organized and existing under and by virtue of the laws of the state of New York, its judgment for the
29 sum of $6,459.17 together with interest thereon from this date at the rate of 6% per annum, together with his damages, aggregating the sum of Six Hundred and Ninety ($690.00) Dollars with interest thereon from this date at the rate of 6% per annum until paid, and also the sum of Seven Hundred Dollars ($700.00) attorney's fees, together with 6% interest thereon from this date until paid, together with al costs of court in and about this behalf expended, and hereof he may have his execution.

It is further ordered, adjudged and decreed by the court that the officers of the court do have and recover of and from the plaintiff, and the said defendant, judgment for all costs, for which they may have their execution.

It is further ordered, adjudged and decreed by the court that the defendant Manhattan Life Insurance Company, recover of and from the plaintiff all costs incurred in making J. H. Hilsman a party defendant, for which it may have his execution.

Recorded in Volume 19, Page 285, of the District Court Minutes of Harris County, Texas, for the 11th Judicial District.

Leave Granted to Def't to File Amended Motion for New Trial.

(Recorded in Vol. 19, P. 287.)

No. 45742.

DAVID COHEN, Executor,
vs.
MANHATTAN LIFE INSURANCE COMPANY.

JULY 19TH, 1910.

Leave to defendants to file First Amended Motion for a New Trial.

Recorded in Volume 19, p. 287 of the District Court
30 Minutes of Harris County, Texas, for the 11th Judicial District.

Defendant's Amended Motion for New Trial.

(Filed July 19th, 1910.)

In 11th Judicial District Court, Harris County, Texas.

No. 45742.

DAVID COHEN, Executor,
vs.
MANHATTAN LIFE INSURANCE COMPANY.

Defendant's Amended Motion for a New Trial.

Now comes defendant, the Manhattan Life Insurance Company of New York, and by leave of the court files this its amended motion for a new trial in amendment of and substitution for its motion for a new trial filed herein on the 30th day of June, 1910.

Defendant moves that the court set aside the judgment heretofore rendered herein, and grant defendant a new trial, or render judgment for defendant, for the following reasons, towit:

1. The Court erred in rendering judgment for the plaintiff for any amount because the evidence shows conclusively that defendant Insurance Company had paid the full amount due on the life insurance policy to J. H. Hilsman, who in any view of the law or facts had at least sufficient interest in said policies to authorize him to collect the same, and the payment to Hilsman discharged the Insurance Company from liability, and any claim that plaintiff may have against Hilsman, and not against the Insurance Company.

2. The court erred in rendering judgment for plaintiff for any amount, because the evidence shows conclusively that the Insurance policies were transferred to J. H. Hilsman by valid transfers de-

livered and consummated in the State of Georgia, that under the laws of Georgia such transfers were valid, and that plaintiff
31 has no interest in said policies.

3. The court erred in rendering judgment for the plaintiff for any amount, because the evidence shows that the insurance policies were transferred by the insured to J. H. Hilsman as part of an illegal transaction of such a character that plaintiff is entitled to no relief in law or in equity.

4. The Court erred in rendering judgment for plaintiff for statutory damages and for attorney's fees, because there is no evidence that the Insurance Company failed to pay the policies within the time specified in the policies after demand made therefor, within the true spirit and proper construction of the statute, and the evidence does show that there was no such failure or refusal to pay as is contemplated by the statute.

5. The court erred in rendering judgment for plaintiff for statutory damages and for attorney's fees, because the Texas Statute, Revised Statute Article 3071 as construed in this case is in conflict with and in violation of Section 1, Article 14 of the Amendments of the Constitution of the United States.

6. The Court erred in rendering judgment for $700.00 attorney's fees because, such amount is excessive and unreasonably large.

7. The court erred in failing and refusing to allow credit for the $460.00 paid by J. H. Hilsman to the insured, and interest thereon from date of such payment and the judgment of the court is excessive.

8. The judgment of the court is contrary to the law and the evidence.

W. J. MORONEY,
Attorney for Defendant.

Filed July 19th, 1910. Henry Albrecht, Clerk District Court, Harris County, Texas, By Frank H. Meyer, Deputy.

32 *Order Overruling Motion for a New Trial.*

(Recorded in Vol. 19, P. 287.)

No. 45742.

DAVID COHEN, Executor,
vs.
MANHATTAN LIFE INSURANCE COMPANY.

JULY 19, 1910.

On this day came on to be heard Defendant's Amended Motion for a New Trial and the same having been heard and considered by the court it is ordered by the court that said motion be and the same is hereby overruled, to which ruling of the court defendant excepts and in open court gives notice of appeal to the Court of

l Appeals in and for the First Supreme Judicial District of as.

Recorded in Volume 19 Page 287 of the District Court Minutes Harris County, Texas, for the 11th Judicial District.

Defendant's Appeal Bond.

Filed July 27th, 1910.

In 11th Judicial District Court, Harris County, Texas.

No. 45742.

DAVID COHEN, Executor,
vs.
MANHATTAN LIFE INSURANCE COMPANY.

Whereas, heretofore, to-wit, on the 30th day of June 1910 in above entitled and numbered cause pending in the 11th Judicial trict Court, Harris County, Texas, David Cohen, in his capacity independent executor under the will of Jacob Cohen, deceased, recovered a judgment against the Manhattan Life Insurance Company, a corporation, for the sum of $6,459.17 together with $690.00 statutory damages and $700.00 attorney's fees, h 6% interest per annum from the date of said judgment until d, and all costs of suit, from which judgment said Manhattan e Insurance Company has appealed to the Court of Civil Appeals he First Supreme Judicial District of Texas, and said appellant ired to suspend the execution of the judgment.

Therefore, we, the Manhattan Life Insurance Company, as princi- and The United States Fidelity & Guaranty Company, as surety, hereby promise to pay to the said David Cohen, in his capacity independent executor under the will of Jacob Cohen, deceased, sum of Sixteen Thousand Dollars ($16,000.00) conditioned that d Manhattan Life Insurance Company shall prosecute its appeal h effect and in case the judgment of the Supreme Court or the urt of Civil Appeals shall be against it, that it shall perform its gment, sentence or decree, and pay all such damages as said urt may award against it.

Witness our hands this 27th day of July, 1910.

MANHATTAN LIFE INSURANCE COMPANY,
By W. J. MORONEY, *Attorney, Principal.*

THE UNITED STATES FIDELITY & GUARANTY COMPANY,
[SEAL.] By EDWD. R. LEWIS,
Its Attorney in Fact, Sureties.

pproved and filed July 27th, 1910.

HENRY ALBRECHT, *C. D. C., H. C.*
By T. W. BROWNE, *Deputy.*

Filed July 27th, 1910. Henry Albrecht, C. D. C., H. C., By T. W. Browne, Deputy.

34 *Assignments of Error.*

Filed July 21st, 1910.

In 11th Judicial District Court, Harris County, Texas.

No. 45742.

DAVID COHEN, Executor,
vs.
MANHATTAN LIFE INSURANCE COMPANY.

Appellant's Assignments of Error.

Now comes the Manhattan Life Insurance Company defendant in the above entitled and numbered cause, and on appeal to the Court of Civil Appeals, First Supreme Judicial District of Texas, files the following assignments of Error.

1. The Court erred in rendering judgment for the plaintiff for any amount, because the evidence shows conclusively that the defendant Insurance Company had paid the full amount due on the life Insurance policies to J. H. Hilsman who in any view of the law or facts had at least sufficient interests in said policies to authorize him to collect the same, and the payment to Hilsman discharged the Insurance Company from liability, and any claim that plaintiff may have is against Hilsman and not against the Insurance Company.

2. The Court erred in rendering judgment for plaintiff for any amount because the evidence shows conclusively that the Insurance policies were transferred to J. H. Hilsman by valid transfers delivered and consummated in the State of Georgia; that under the laws of Georgia, such transfers were valid and that plaintiff had no interest in said policies.

3. The court erred in rendering judgment for the plaintiff for any amount, because the evidence shows that the insurance policies were transferred by the insured to J. H. Hilsman as part of an illegal transaction of such a character that plaintiff is entitled to no relief in law or in equity.

35 4. The court erred in rendering judgment for plaintiff for statutory damages and for attorney's fees because there is no evidence that the Insurance Company failed to pay the policies within the time specified in the policies after demand made therefor, within the true spirit and proper construction of the statute, and the evidence does show that there was no such failure or refusal to pay as is contemplated by the statute.

5. The court erred in rendering judgment for plaintiff for statutory damages and for attorney's fees, because the Texas Statute, Revised Statute Article 3071, as construed in this case, is in conflict

with and in violation of Section 1, Article 14 of the Amendments to the Constitution of the United States.

6. The Court erred in rendering judgment for $700.00 attorney's fees because such amount is excessive and unreasonably large.

7. The Court erred in failing and refusing to allow credit for the $466.00 paid by J. H. Hilsman to the insured, and interest thereon from date of such payment, and the judgment of the court is excessive.

W. J. MORONEY,
Attorney for Defendant, Manhattan Life Ins. Co.

Filed July 21st, 1910. Henry Albrecht, C. D. C. H. C. By T. W. Browne, Deputy.

Clerk's Cost Bill.

THE STATE OF TEXAS:

No. 45742.

DAVID COHEN, Plaintiff,
vs.
MANHATTAN LIFE INSURANCE CO., Defendant.

36 To Officers of Court, Dr.

Clerk's Costs.		*Sheriff's Costs.*	
Docketing	$.20	Jury Fees	$.50
Filing	.75	Stenographer's Fee	3.00
Entering Appearances.	.30		
Copy Petition	5.00		
Entering Orders	4.50		
Entering Judgments	1.50		
Docketing Motions	.15		
Notice	2.50		
Approving Bond	1.50		
Transcript	17.00		
Filing brief & Certif.	.90		
Taxing Costs	.25		
	$34.55		

Recapitulation.

Clerk	$34.55
Sheriff	.50
Stenographer's Fee	3.00
	$38.05

STATE OF TEXAS,
Harris County:

I, Henry Albrecht, Clerk District Court in and for Harris County, do hereby certify that the above is a correct Bill of all Costs incurred in the above numbered and entitled suit up to this date.

In witness whereof, I hereunto affix my hand and seal of the Court, at office in Houston, this 29th day of July, A. D., 1910.

[SEAL.] HENRY ALBRECHT,
Clerk District Court, Harris County, Texas,
By A. A. NANCE, *Deputy.*

37 *Clerk's Certificate.*

THE STATE OF TEXAS,
County of Harris:

I, Henry Albrecht, Clerk of the District Court of Harris County, Texas, do hereby certify that the above and foregoing 33 pages is a true and correct Transcript of all proceedings had in cause No. 45742, entitled David Cohen, Executor, vs. Manhattan Life Insurance Company as the same appears on file and of record in my office, with the exception of the Statement of Facts in said cause.

Given under my hand and seal of said Court, at office in Houston, Texas, this the 28th day of July, A. D., 1910.

[SEAL.] HENRY ALBRECHT,
Clerk District Court, Harris County,
By A. A. NANCE, *Deputy.*

Statement of Facts.

In 11th Judicial District Court, Harris County, Texas.

No. 45742.

DAVID COHEN, Executor,
vs.
MANHATTAN LIFE INSURANCE COMPANY.

Statement of Facts.

Be it remembered that the following is a full, true and correct statement of all the facts proved and evidence introduced on the trial of said cause, to-wit:

38 *Plaintiff's Evidence.*

Plaintiff introduced in evidence a written agreement of the parties as follows, to-wit:

In the 11th Judicial District Court of Harris County, Texas.

No. 45742.

DAVID COHEN, Executor,
vs.
MANHATTAN LIFE INSURANCE COMPANY.

Agreement of Parties.

The parties whose names are signed hereto stipulate and agree as follows:

1.

The matters herein agreed to as facts shall be considered as established and undisputed, but any party hereto shall have the right to offer on the trial any legal and competent evidence not in conflict with this agreement, and subject to such objections, if any, as may be made. The parties may hereafter amend their pleadings to conform with this agreement or as they may deem otherwise proper; but it — agreed that in rendering judgment proper legal effect shall be given to the facts herein set forth whether they are sufficiently pleaded or not.

2.

On April 7, 1893, Jacob Cohen resided in Galveston County, Texas, and the Manhattan Life Insurance Company was then, as it still is, a life insurance corporation duly incorporated under the laws of the State of New York. On said date, April 7, 1893, it was doing a life insurance business in Texas under proper license. It was not doing or licensed to do business in Texas when this suit was filed on May 15, 1908, but about July 1, 1908, it was again licensed to do and is now doing business in Texas as a life insurance Company.

3.

On April 7, 1893, said Insurance Company issued to Jacob
39 Cohen two policies of insurance on his life for $3,750.00 each, payable, in case of his death, and subject to various provisions therein stated, to his executors, administrators or assigns. Said policies were numbered respectively 84,873 and 84,874. A copy of said policy No. 84,873 with a subsequent endorsement thereon is attached to the first amended original answer of said Insurance Company, marked "Exhibit A," and the same is made a part of this agreement and it is hereby referred to for greater particularity.

Said policy No. 84,874, was for the same amount and of like date, tenor and effect, and the same was endorsed in a like manner. Said endorsements were authentic, valid and in accordance with the facts.

4.

Jacob Cohen died in Harris County, Texas, on October 11, 1907. Said policies were then in full force and effect, subject to whatever rights the Insurance Company had under the loans thereon as hereinafter stated, and also subject to whatever rights J. H. Hilsman may have had under the facts hereinafter stated and as may be proved on the trial hereof.

Jacob Cohen was a resident citizen of Bexar County, Texas, at the time of his death.

5.

Jacob Cohen left a will appointing David Cohen independent executor of his estate. Prior to the institution of this suit said will was duly probated in Galveston County, Texas, and said David Cohen

duly qualified and is now acting as independent executor of said estate.

6.

Prior to July 15th, 1907, said Jacob Cohen borrowed from said Insurance Company two sums of $875.00 each, each sum being secured by a pledge of one of said policies, and at the time of
40 Jacob Cohen's death there was due said Insurance Company, on both of said policies, the sum of $1,750.00, which sum, it is agreed, was a valid charge against said policies and a proper credit on the amount of the same, said amount being $3,750.00 each or a total of $7,500.00, the balance owing by said Insurance Company on both said Policies at the date of said Jacob Cohen's death being $5,750.00.

7.

By instruments dated July 15, 1907, said Jacob Cohen purported to assign said policies to J. H. Hilsman. A copy of the assignment of said Policy No. 84,873 is attached to said amended answer, marked "Exhibit B" and the same is made a part of this agreement and is hereby referred to for greater particularity.

The assignment of Policy No. 84,874, was one of the same date and of like tenor and effect.

In connection with said purported assignments said Jacob Cohen also executed to said J. H. Hilsman an order on said Life Insurance Company to deliver said policies upon the payment of said $1,750 loan. A copy of said order is attached to said answer, marked "Exhibit B."

At the time of said purported assignments Jacob Cohen resided in San Antonio, Texas. J. H. Hilsman resided in Atlanta, Georgia, and Hilsman had an agent in San Antonio, Texas, through whom the negotiations for the transaction were begun, and the transaction itself definitely agreed upon, the agreement being that Hilsman would pay Jacob Cohen $460.00 for his equity in said policies, whereupon Cohen wired Hilsman to send the papers, and the following correspondence, by letter and telegram, passed between them:

ATLANTA, GA., *July* 11, 1907.

Mr. Jacob Cohen, P. O. Box 282, San Antonio, Texas.

41 DEAR SIR: In accordance with your wire of this morning we are herewith enclosing to you one set of Assignment papers for Policy #84,873, and one set of Assignment papers for Policy #84,874, which you will please execute as below instructed,—

1. Sign your full name just as it is written in the Policy, on each of the six papers.

2. Your signature must be witnessed on each of the papers by a Notary Public, he using his seal on each.

3. Enclose the last Premium Receipts for each of the Policies.

4. Sign the enclosed Order to the Company to deliver the Policies to us upon the payment to them of the loan.

5. Copy of the Loan Agreement to you from the Company must be enclosed so that we can have official evidence that the Beneficiary is your estate, and that no one else has any equity in the Policy.

6. Send all the papers, that are herewith enclosed, duly executed in a sealed envelope, with this draft attached, and upon arrival if in good shape—we will duly honor.

Very truly yours,
(Signed) J. H. HILSMAN.

8 Enclosures.

SAN ANTONIO, TEXAS, *July* 13, '07.

Messrs. J. H. Hilsman Company, Atlanta, Ga.

DEAR SIRS: Yours of the 11th to hand. I have all the
42 papers required by you with the exception of the Loan Agreement; but I hold the Company's receipt for the policies as collateral security for the loan and I have a copy of the Policy. There is no other beneficiary except my estate. I am not married and all my policies are made payable to me, my executors or estate. I shall attach both receipts to the other documents and if this meets with your approval, please wire me upon receipt of this letter and I shall forward the papers.

Yours truly,
(Signed) JAKE COHEN.

Copy Telegram Sent by "Postal" Company.

JULY 15, 1907.

Jake Cohen, Cotton Merchant, San Antonio, Texas:

Forward draft and papers.
(Signed) J. H. HILSMAN.

ATLANTA, GA., *July* 15*th*, 1907.

Mr. Jake Cohen, Cotton Merchant, P. O. Box 282, San Antonio, Texas.

DEAR SIR: In answer to your favor of the 13th inst. you may forward the papers sent to you in ours of the 11th duly executed as per our instructions, and on arrival we will promptly honor the draft, provided the papers are in good shape. We confirmed the above by wire this morning.

Thanking you and awaiting your further commands, we are,
43 Very Truly yours,
(Signed) J. H. HILSMAN.

SAN ANTONIO, TEXAS, *July* 15, 1907.

Messrs. J. H. Hilsman Co., Atlanta, Ga.

DEAR SIRS: Your message to hand and I beg to enclose all documents relating to the transfer of my two Life Insurance Policies 84873 and 84874 in the Manhattan Life Insurance Company, all of which I trust you will find correct and will honor my draft for $460.00 attached to these documents.

Thanking you very much, I am,
Yours very truly,
(Signed) JAKE COHEN.

Accordingly on July 15, 1907, said Jacob Cohen signed and acknowledged said purported assignments and signed said order on the Insurance Company and attached the same to a bank draft on Hilsman for $460.00 and deposited said draft in San Antonio for collection, and the same was paid by Hilsman on presentation to him in Atlanta, Georgia, on July 19, 1907, and said assignments and order were then and there delivered to Hilsman with said draft. J. H. Hilsman was not related to Jacob Cohen, nor was Cohen in debt to him, unless it should be by reason of the facts above stated, nor did Hilsman have any interest in the life of said Cohen other than this transaction.

8.

44 Said Jacob Cohen, Hilsman and his said agent were engaged in speculative transactions, and said assignments were made as a part of and in connection with a certain transaction in what is commonly called "cotton futures" the money being paid to and received and used by Jacob Cohen to speculate in the future price of cotton, without its being contemplated that there would be actual delivery thereof, or bargain and sale, the said Hilsman or his said agent, being interested in the transaction, and the purpose of the transaction being known by all the parties, which purpose was carried into effect, through the said agency of J. H. Hilsman and J. H. Hilsman, he being engaged in the brokerage business.

9.

On April 10, 1908, the Insurance Company received from both claimants, Hilsman and David Cohen, Executor, proofs of death in proper form, to which no objection was made. Each claimant objected to the Insurance Company paying the other. Hilsman advised the Insurance Company that he claimed the right to receive the face of the policies, less said $1,750 loan. Plaintiff David Cohen, Executor, advised the Insurance Company that he also claimed the right to receive the face of said policies, less the amount of said loan, on the ground that Hilsman had no insurable interest, that the assignments to him were illegal and void for that reason, and also for the reason that said assignments were part of a gaming transaction, as hereinbefore set out. The Insurance Company admitted liability for the face of the policies, less the amount of said loans, and offered to pay the same to the joint order of the rival claimants, or to pay the money into court if the matter could be so arranged that the parties would appear and interplead in a court of competent jurisdiction where any judgment that might be rendered would fully protect the Insurance Company from double liability.

45 Said claimants failing to reach any agreement, on May 6, 1908, Hilsman gave said Insurance Company a satisfactory indemnity bond, and the Insurance Company paid to Hilsman the sum of $5,750.00, being the full face of said policies less the amount of said loans, and said policies were thereupon re-

ceipted in full by Hilsman and surrendered to the Insurance Company.

Before paying said policies to Hilsman the Insurance Company had notice that plaintiff, David Cohen, Executor, claimed that said assignments were invalid, as aforesaid, and that plaintiff was entitled to recover thereon, but the payment was made because the Insurance Company was advised that Hilsman was entitled to collect the same, and that in any event the aforesaid indemnity would protect it, and because it was advised that it was not practicable to secure a determination of the controversy in a suit where the court would have proper and sufficient jurisdiction of all the parties and the subject matter. It was not the purpose of the Insurance Company to contest or delay payment, and the payment to Hilsman was made under the circumstances above set out. It is not the purpose of this agreement to determine how far, if at all, the facts in respect to notice and good faith are material issues in this case, that being deemed a question of law, nor is this agreement to be construed as admitting as a matter of law that Hilsman had any right to said policies or their proceeds, or that said payment, or any part thereof, was rightfully made to him. It is, however, agreed as a fact that Hilsman has not been repaid said sum of $460.00, and the Insurance Company has not been repaid the amount of said loan, except as above stated, and that nothing has yet been paid to the plaintiff.

10.

The laws of New York and Georgia, or either of said States, so far as the same may be held to be relevant to any issue in this case, may be proved by introducing in evidence the reports of the
46 opinions of the courts of said States, or either of them, as reported officially, or in the Reporter System, or in any other published reports generally recognized by the Courts as authentic and reliable; but the right is reserved to object to such evidence on the ground that such laws are immaterial and irrelevant, but not as to the mode of proof as above set forth if any such objections shall be overruled.

Witness our hands at Houston, Texas, this 14th day of April, 1909.

(Signed) HUNT, MYER & TOWNES,
Attorneys for Plaintiff.

(Signed) W. J. MORONEY,
Attorney for Manhattan Life Insurance Company.

It was shown that on May 15, 1908, plaintiff, by Hunt, Myer & Townes, attorneys, filed his original petition in this suit against the Manhattan Life Insurance Company and J. H. Hilsman as defendants, alleging among other allegations that Hilsman was wrongfully claiming the proceeds of the policies, and seeking an adjudication of the Hilsman claim. Hilsman never appeared or answered in the suit and as he resided in Atlanta, Georgia, no citation, notice

or other process was served on him. Plaintiff's first amended original petition which was filed November 11, 1908, omitted Hilsman as defendant.

E. P. Phelps being duly sworn testified that he was a licensed and practicing attorney at law, that he was familiar with the nature of this case and that in his opinion $1,000.00 would be a reasonable attorney's fee for bringing and prosecuting this suit for plaintiff and rendering all incidental legal services in connection with the suit.

Plaintiff rested.

47 *Defendant's Evidence.*

Defendant introduced in evidence the following statutory provisions and Supreme Court decisions of the State of Georgia, to-wit:

In 11th Judicial District Court, Harris County, Texas.

No. 45742.

DAVID COHEN, Executor,
vs.
MANHATTAN LIFE INSURANCE COMPANY.

On the trial of the above entitled and numbered cause defendant introduced in evidence the following decisions of the Supreme Court of the State of Georgia:—

1.

Union Fraternal League v. Walton, 109 Ga., 1, 34 S. E. 317, October 25, 1899, opinion of the Court by Little J. Dissenting opinion by Lumpkin P. J. The effect of this decision, as stated in the syllabus by the Court, is as follows:—

1. "While a valid contract of insurance cannot lawfully be taken on the life of another by one who has no insurable interest therein, because it contravenes public policy, yet as one has an insurable interest in his own life, he may lawfully procure insurance thereon for the benefit of any other person whose interest he desires to promote. Such a contract cannot be defeated because of want of insurable interest in the beneficiary, when it appears that the person whose life is insured acted for himself, at his own expense, and in good faith, to promote the interest of the beneficiary, in taking out the policy. A contract so entered is in no sense a wagering or speculative one."

2. "A contract entered into by a benefit society with a member is executory, and its terms will be ascertained from the certificates issued to the member, in connection with the charter and
48 laws of the society, subject to the law of the state under which it was created; and, if nothing exists which restricts the appointment of a beneficiary to receive the benefit fund, the member may, at the time he executes the contract, legally designate whom-

soever he pleases as beneficiary, and his right to do so cannot be questioned."

2.

Ancient Order United Workman v. Brown, 112 Ga., 545, 37 S. E. 890, January 24, 1901, opinion of the court by Fish J. dissenting opinion by Lumpkin P. J. The effect of this decision, as stated in the syllabus by the Court, is as follows:

1. "A member of mutual insurance order may, when acting in good faith, legally designate, as the beneficiary in a certificate of life insurance issued by the order, one who has no insurable interest in the life of the member, provided there be, at the time the certificate is issued, no restriction in the charter, constitution or laws of the order, or in the statutes of the state, forbidding the right to appoint such a beneficiary.

2. "Although the application and certificate both stipulate that the right of the member to participate in the benefit fund is expressly conditioned upon his compliance with the laws, regulations and requirements which are or may be enacted by the order, a by-law enacted subsequently to the issuance of the certificate will be given a prospective operation in the absence of a clear intent that it shall act retrospectively."

3. "To render an insurance company liable for attorney's fees, under the provisions of Section 2140 of the Civil Code, a demand and refusal to pay 60 days before suit is brought, must be plainly averred, and the truth of such averment must be established on the trial. No such demand and refusal being averred and proved
49 in the present case, the recovery of attorney's fees was not authorized."

In this case a judgment in favor of Mrs. Brown on a life insurance policy was affirmed, although it appeared that she had no insurable interest in the life of the insured, and that she purchased and kept it in force at her own expense.

3.

Rylander v. Allen, 125 Ga. 206, 53 S. E. 1032, March 28, 1906, opinion of the Court by Fish, C. J., all the justices concurring. The effect of this decision as stated in the syllabus by the Court, is as follows:

1. "One who has the right to procure insurance on his own life and assign the policy to another, who has no insurable interest in the life insured, provided it be not done by way of cover for a wager policy."

Doody v. Green, 62 S. E. 894, November 19, 1908, opinion of the Court by Evans P. J. all the justices concurring. This case approves and follows the previous cases above cited.

It was agreed by counsel for both parties that this Court, or any appellate Court to which this case may be taken should have the right to read said opinion at large for a more complete understanding of the same, without incorporating said opinions in the record.

Defendant also introduced in evidence the following sections of the Civil Code of Georgia of 1895, to-wit:

"Section 2114. An insurance upon life is a contract by which the insurer, for a stipulated sum, engages to pay a certain amount of money if another dies within the time limited by the policy. The life may be that of the assured, or of another in whose continuance the assured has an interest.

50 Section 2116. The assured may direct the money to be paid to his personal representative, or to his widow, or to his children, or to his assignee; and upon such direction, given and assented to by the insurer, no other person can defeat the same. But the assignment is good without such assent."

Section 3077. All choses in action arising upon contract may be assigned so as to vest the title in the assignee, but he takes it, except negotiable securities, subject to the equities existing between the assignor and debtor at the time of the assignment and until notice of the assignment is given to the person liable."

Plaintiff's Rebuttal Evidence.

Plaintiff introduced in evidence the following statutory provisions and supreme court decisions of the State of Georgia, towit:

Section 8 of the Georgia Code, which is as follows:

"Lex Loci: the validity, form and effect of all writings or contracts are determined by the laws of the place where executed; When such writing or contract is intended to have effect in this state, it must be executed in conformity with the laws of this state. * * *."

Section 3668 of the Georgia Code, which is as follows:

"A contract which is against the policy of the law cannot be enforced. Such are contracts tending to corrupt legislation, and the judiciary * * * wagering contracts * * *."

Section 2090 of the Georgia Code, which is as follows:

"To sustain any contract of insurance, it must appear that the assured has some interest in the property or event insured, and such as he represents himself to have. A slight or contingent interest is sufficient, whether legal or equitable."

Section 3537 of the Georgia Code, which is as follows:

"Possibility cannot be sold." * * * A bare contin-

51 gency or possibility cannot be subject to sale, unless there exists an express and present right in the person selling a future benefit; so a contract for the sale of goods to be delivered at a future day where both parties are aware that the seller expects to purchase himself to fulfill his contract, and no skill or labor or expense enters into consideration, but same is in pure speculation and chance, is contrary to the policy of the law, and cannot be enforced by either party."

Section 3671 of the Georgia Code which is as follows:

"Gaming contracts are void, and all evidence of debt or encumbrance or liens on the property executed. Upon a gaming consideration are void at the hands of any person. Money paid or property delivered upon such consideration may be recovered back from

the winner by the loser, if he shall sue for same in six months after the loss, and after the expiration of that time it may be sued for by any person at any time within four years for the joint use of himself and the educational fund of the county."

2.

Plaintiff also introduced the following decisions of the Supreme Court of Georgia:

Exchange Bank of Macon, vs. Loh, 104 Ga. 446; 44 L. R. A., 380, Lumpkin, presiding Justice, delivered the opinion. The effect of the decision as stated in the syllabus by the court, is as follows:

(1). A creditor has, for the purpose of indemnifying himself against loss, but for no other, an insurable interest in the life of his debtor.

(2). This interest cannot exceed in amount that of the indebtedness to be secured. (*a*) Such indebtedness may, however, include the cost of taking out and keeping up the insurance, if made a charge against the debtor or his estate, or upon the proceeds
52 of the property when collected."

In Quillan v. Johnson, 122 Ga. 49; 49 S. E. 801 the supreme court of Georgia holds that "Irrespective of whether or not the owner and holder of a policy of insurance on his own life may legally sell and assign the policy to one having no insurable interest in his life, the policy holder is certainly not at liberty to make the policy the subject matter of a purely wagering or speculative contract between himself and a person having no interest therein".

In Hinds v. Bank & Trust Company, 120 Ga. 711; 48 S. E. 120 the supreme court of Georgia holds, that the mere knowledge of the lender of money, that the borrower intends to use it for an illegal or immoral purpose, will not prevent a recovery of the money loaned, unless the lender participated in the illegal transaction or did something to further the consummation of the unlawful design.

We hereby agree that the above and foregoing is a full, true and correct statement of all the facts proved and evidence introduced on the trial of said cause.

HUNT, MYER & TOWNES,
Attorneys for Plaintiff.
W. J. MORONEY,
Attorney for Defendant.

Approved:
CHAS. E. ASHE, *Judge Presiding.*

(Endorsed:) No. 4659, David Cohen, Executor, v. Manhattan Life Insurance Co., Statement of Facts. Filed July 19th, 1910, Henry Albrecht Clerk District Court, Harris County, Texas. By Frank H. Meyer, Deputy. Filed in Court Civil Appeals August 6, 1910, H. L. Garrett, Clerk. Filed in the Court of Civil Appeals at San Antonio, Texas, Feb. 1, 1911, Jos. Murray, Clerk.

53 *Opinion.*

No. 4659.

MANHATTAN LIFE INSURANCE COMPANY, Appellant,
vs.
DAVID COHEN, Executor, Appellee.

Appeal from Harris.

David Cohen, as executor of the estate of Jacob Cohen, deceased, brought this suit against the Manhattan Life Insurance Company of New York, to cover principal and interest alleged to be due on two life insurance policies for $3,750.00 each, issued by said Company on the life of Jacob Cohen. The plaintiff also prayed for statutory damages and attorney's fees.

In its answer the defendant averred that the insured, Jacob Cohen, borrowed $875.00 from it on the policies and then sold them to J. H. Hilsman of Atlanta, Georgia for $460.00, and that the Insurance Company had paid to Hilsman their face values, less the amount of the loans it had made thereon.

The suit was tried without a jury; and the court, holding that the assignment of the policies to Hilsman was void, refused to give credit for the $460.00 paid by Hilsman to the insured as the consideration for such assignment, and rendered judgment in favor of plaintiff for the face value of the policies, less the sums lent the insured by defendant company, which was for $5,750.00, with interest thereon at the rate of 6% per annum from June 10, 1908, total $6,459.17, for $690.00 statutory damages and $700.00 attorney's fees, with interest at the rate of 6% per annum from date of judgment.

Conclusions of Fact.

It was agreed between the parties that certain facts should be considered as established and undisputed, but that either party should have the right to offer on the trial any legal and competent
54 evidence not in conflict with such agreement, and subject to objections, if any, as may be made, and that the parties might amend their pleadings to conform to the agreement as they should deem proper; but that in rendering judgment proper legal effect should be given the facts set out in the agreement, whether sufficiently pleaded or not. These are the facts comprehended by the agreement:

1. On April 7, 1893, Jacob Cohen resided in Galveston County, Texas, and the Manhattan Life Insurance Company was then, and still is, a life insurance corporation duly incorporated under the laws of the state of New York. On said date, April 7, 1893, it was doing a life insurance business in Texas under a proper license. It was not doing or licensed to do business in Texas when this suit was filed on May 15, 1908, but about July 1, 1908, it was again licensed

to do and is now doing business in Texas as a life insurance company.

2. On April 7, 1893, said insurance company issued to Jacob Cohen two policies of insurance on his life for $3,750.00 each, payable, in case of his death, and subject to the various provisions therein stated, to his executors, administrators or assigns. Said policies were numbered respectively 84,873 and 84,874. A copy of said policy No. 84,873, with a subsequent endorsement, is attached to the first amended original answer of said Insurance Company, marked "Exhibit A" and the same is made a part of this agreement and it is hereby referred to for greater particularity. Said policy No. 84,874, was for the same amount and of like date, tenor and effect, and the same was endorsed in like manner. Said endorsements were authentic, valid and in accordance with the facts.

3. Jacob Cohen died in Harris County, Texas, on October 11, 1907. Said policies were in full force and effect, subject to whatever rights the Insurance Company had under the loans
55 thereon, as hereinafter stated, and also subject to whatever rights J. H. Hilsman may have had under the facts hereinafter stated and as may be proved on the trial hereof. Jacob Cohen was a resident of Bexar County, Texas, at the time of his death.

4. Jacob Cohen left a will appointing David Cohen independent executor of his estate. Prior to the institution of this suit said will was duly probated in Galveston County, Texas, and said David Cohen duly qualified and is now acting as independent executor of said estate.

5. Prior to July 15, 1907, said Jacob Cohen borrowed from said Insurance Company two sums of $875.00 each, each sum being secured by a pledge of said policies, and at the time of Jacob Cohen's death there was due said insurance company, on both of said policies, the sum of $1,750.00, which sum, it is agreed, was a valid charge against said policies and a proper credit on the amount of the same, said amount being $3,750.00 each or a total of $7,500.00, the balance owing by said insurance company on both policies at the date of said Jacob Cohen's death being $5,750.00.

6. By instruments dated July 15, 1907, said Jacob Cohen purported to assign said policies to J. H. Hilsman. A copy of the assignment of said policy No. 84,873 is attached to said amended answer, marked "Exhibit B", and the same is made a part of this agreement and is hereby referred to for greater particularity. The assignment of policy No. 84,874, was of the same date and of like tenor and effect. In connection with said *pruported* assignments said Jacob Cohen also executed to said J. H. Hilsman an order on said Life Insurance Company to deliver said policies upon the payment of said $1,750. loan. A copy of said order is attached to said answer, marked "Exhibit B." At the time of said purported assignment Jacob Cohen resided in San Antonio, Texas; J. H. Hilsman in Atlanta, Georgia, and Hilsman had an agent in San
56 Antonio, Texas, through whom the negotiations for the transaction were begun, and the transaction definitely agreed upon, the agreement being that Hilsman would pay Jacob Cohen $460.00 for his equity in said policies.

After the agreement was made, a correspondence by wire and letter took place between Hilsman, from Atlanta, Ga., and Cohen at San Antonio, Texas, in regard to the form and manner of formally executing the transfer and assignment of the policies thus agreed upon. The letters of the parties to one another of this correspondence are copied in and made a part of the agreement; but they cover too much space to incorporate them in these conclusions, and we do not deem it essential to a correct solution of any question involved that it should be done.

We deem it sufficient to say that, in accordance with said agreement and directions of Hilsman given in the correspondence, on July 15, 1907, said Jacob Cohen signed and acknowledged the purported agreements and signed an order on the insurance company and attached the same to a blank draft on Hilsman for $460.00 and deposited said draft in San Antonio for collection, and the same was paid by Hilsman on presentation to him in Atlanta, Georgia, on July 19, 1907, and said assignment and order were then and there delivered to Hilsman with said draft. Hilsman was not related to Jacob Cohen, nor was Cohen in debt to him, unless it should be by reason of the facts above stated, nor did Hilsman have any interest in the life of said Cohen other than this transaction.

7. Said Jacob Cohen, Hilsman and his agent were engaged in speculative transactions, and said assignments were made as a part of and in connection with a certain transaction in what is commonly called "cotton futures", the money being paid to and received and used by Jacob Cohen to speculate in future prices of cotton,
57 without its being contemplated that there would be actual delivery thereof, or bargain and sale, the said Hilsman or his agent, being interested in the transaction, and the purpose of the transaction being known by all the parties, which purpose was carried into effect, through said agency of J. H. Hilsman, he being engaged in the brokerage business.

8. On April 10, 1908, the Insurance Company received from both claimants, Hilsman and David Cohen, Executor, proofs of death in proper form, to which no objection was made. Each claimant objected to the Insurance Company paying the other. Hilsman advised the Insurance Company that he claimed the right to receive the face of the policies, less said $1,750 loan. Plaintiff David Cohen, Executor, advised the Insurance Company that he also claimed the right to receive the face value of said policies, less the amount of said loan, on the ground that Hilsman had no insurable interest, that the assignments to him were illegal and void for that reason, and also for the reason that said assignments were a part of a gaming transaction, as herein set out. The Insurance Company admitted liability for the face of the policies, less the amount of said loans, and offered to pay the same to the joint order of the rival claimants, or to pay the money into court if the matter could be so arranged that the parties would appear and interplead in a court of competent jurisdiction where any judgment that might be rendered would fully protect the Insurance Company from double liability. Said claimants failing to reach any agreement on

May 6, 1908, Hilsman gave said Insurance Company a satisfactory indemnity bond, and the Insurance Company paid to Hilsman the sum of $5,750.00, being the full face of said policies less the amount of said loans, and said policies were thereupon receipted in full by Hilsman and surrendered to the Insurance Company. Before paying said policies to Hilsman, the Insurance Company had notice that plaintiff, David Cohen, Executor, claimed that said as-
58 signments were invalid, as aforesaid, and that plaintiff was entitled to recover thereon, but the payment was made because the Insurance Company was advised that Hilsman was entitled to collect the same, and that in any event the aforesaid indemnity bond would protect it, and because it was advised that it was not practicable to secure a determination of the controversy in a suit where the court would have proper and sufficient jurisdiction of all the parties and the subject matter. It was not the purpose of the Insurance Company to contest or delay the payment, and the payment to Hilsman was made under the circumstances above set out. It is not the purpose of this agreement to determine how far, if at all, the facts in respect to notice and good faith are material in this case, that being deemed a question of law, nor is this agreement to be construed as admitting as a matter of law that Hilsman had any right to said policies or their proceeds, or that said payment, or any part thereof, was rightfully made to him. It is, however, agreed as a fact that Hilsman has not been repaid said sum of $460.00, and the Insurance Company has not been repaid the amount of said loan, except as above stated, and that nothing has yet been paid plaintiff.

9. The laws of New York and Georgia, or either of said States, so far as the same may be held to be relevant to any issue in this case, may be proved by introducing in evidence the reports of the opinions of the courts of said States, or either of them, as reported officially, or in the Reporter System, or in any other published reports generally recognized by the courts as authentic and reliable; but the right is reserved to object to such evidence on the ground that such laws are immaterial and irrelevant, but not as to the mode of proof as above set forth, if any such objection shall be overruled.

59 The foregoing includes the facts incorporated in the agreement of the parties, and are adopted by this court subject to all the stipulations and conditions contained in the agreement.

Before proceeding further with the conclusions of fact, we will state that it is shown by the record that plaintiff's original petition, filed May 15, 1908, was against the Manhattan Life Insurance Company and J. H. Hilsman as defendants, and among other allegations alleged that Hilsman was wrongfully claiming the proceeds of the policies, and sought to adjudicate his claim; that Hilsman neither appeared nor answered in the suit, and as he resided in Atlanta Georgia, no citation, notice or other process was served on him; and that plaintiff's first amended original petition which was filed November 11, 1908, omitted Hilsman as defendant.

There was uncontradicted testimony that $1,000.00 would be a reasonable attorney's fee for bringing and prosecuting this suit for plaintiff and rendering all incidental legal services in connection

with the suit. This was sufficient to warrant the court in finding for plaintiff $700.00 attorney's fees.

In our view of the case the facts agreed upon, as above stated, together with the finding as to what is a reasonable attorney's fee for bringing and prosecuting this suit for plaintiff for all necessary is a correct disposition of the case. But as stress is laid upon the evidence introduced as to the law of the State of Georgia, apparent from statutes and decisions, we will state such evidence and in our conclusions of law make some comments on it.

Said evidence is as follows: The defendant introduced in evidence the following decisions of the Supreme Court of Georgia:

1. Union Fraternal League v. Walton, 109 Ga. 1, 34 S. E. 317, October 25, 1899; opinion of the Court by Little, J. Dissenting opinion by Lumpkin, P. J. The effect of this decision, as stated in the opinions by the Court, is as follows:

"(1) While a valid contract of insurance cannot lawfully be taken on the life of another by one who has no insurable interest therein, because it contravenes public policy, yet as one has an insurable interest in his own life he may lawfully procure insurance thereon for the benefit of any other person whose interest ... Such a contract cannot be defeated because of want of insurable interest in the beneficiary, where it appears that the person whose life is insured acted for himself ... and in good faith to promote the interest of the beneficiary, ... a contract so entered ... wagering or speculative one.

[illegible]

[illegible]

ute will be given a prospective operation, in the absence of a clear intent that it shall act retrospectively.'

(3) 'To render an insurance company liable for attorney's fees, under the provisions of Section 2140 of the Civil Code, a demand and refusal to pay 60 days before suit is brought, must be plainly averred, and the truth of such averment must be established by the trial. No such demand and refusal being averred and proved in the present case, the recovery of attorney's fees was not authorized.'

In this case a judgment in favor of Mrs. Brown on a life insurance policy was affirmed, although it appeared that she had no insurable interest in the life of the insured, and that she purchased and kept it in force at her own expense.

3. Rylander v. Allen, 125 Ga. 206, 53 S. E. 1052, March 28, 1906, opinion of the Court by Fish, C. J., all the justices concurring. The effect of this decision as stated in the syllabus by the Court, is as follows:

(1) 'One has the right to procure insurance on his own life and assign the policy to another, who has no insurable interest in the life insured, provided it be not done by way of cover for a wager policy.'

4. Doody v. Green, 62 S. E. 894, November 19, 1908, opinion of the Court by Evans P. J., all the justices concurring. This case approves and follows the previous cases above cited.

It was agreed by counsel for both parties that this Court, or any appellate Court to which this case may be taken should have the
62 right to read said opinions at large for a more complete understanding of the same, without incorporating said opinions in the record.

5. Defendant also introduced in evidence the following sections of the Civil Code of Georgia of 1895, to-wit:

'SECTION 2114. An insurance upon life is a contract by which the insurer, for a stipulated sum, engages to pay a certain amount of money if another dies within the time limited by the policy. The life may be that of the insured, or of another in whose continuance the assured has an interest.

'SECTION 2116. The assured may direct the money to be paid to his personal representative, or to his widow, or to his children, or to his assignee; and upon such direction, given and assented to by the insurer, no other person can defeat the same. But the assignment is good without such assent.'

'SECTION 3077. All choses in action arising upon contract may be assigned so as to vest the title in the assignee, but he takes it, except negotiable securities, subject to the equities existing between the assignor and debtor at the time of the assignment, and until notice of the assignment is given to the person liable.'

Plaintiff introduced in evidence the following statutory provisions and supreme court decisions of the State of Georgia, to wit.

Section 8 of the Georgia Code, which is as follows:

'Lex Loci: The validity, form and effect of all writings or contracts are determined by the laws of the place where executed. When such writing or contract is intended to have effect in this state, it must be executed in conformity with the laws of this state * * *.'

Section 3668 of the Georgia Code, which is as follows:

'A contract which is against the policy of the law cannot be
63 enforced. Such are contracts tending to corrupt legislation,
and the judiciary * * * wagering contracts * * *.'

Section 2090 of the Georgia Code, which is as follows:

'To sustain any contract of insurance, it must appear that the assured has some interest in the property or event insured, and such as he represents himself to have. A slight or contingent interest is sufficient, whether legal or equitable.'

Section 3537 of the Georgia Code, which is as follows:

'Possibility cannot be sold'. * * * 'A bare contingency or possibility cannot be subject to sale unless there exists an express and present right in the person selling to a future benefit; so a contract for the sale of goods to be delivered at a future day where both parties are aware that the seller expects to purchase himself to fulfill his contract, and no skill or labor or expense enters into consideration, but same is in pure speculation and change, is contrary to the policy of the law, and cannot be enforced by either party.'

Section 3671 of the Georgia Code which is as follows:

'Gaming contracts are void, and all evidence of debt or encumbrance or liens on the property executed upon a gaming consideration are void at the hands of any person. Money paid or property delivered upon such consideration may be recovered back from the winner by the loser, if he shall sue for same in six months after the loss, and after the expiration of that time it may be sued for by any person at any time within four years for the joint use of himself and the educational fund of the county.'

2.

"Plaintiff also introduced the following decisions of the Supreme court of Georgia:

Exchange Bank of Macon vs. Loh, 104 Ga. 446; 44 L. R. A. 380. Lumpkin, presiding Justice, delivered the opinion. The effect of
the decision as stated in the syllabus by the court, is as fol-
64 lows:

'(1) A creditor has, for the purpose of indemnifying himself against loss, but for no other, an insurable interest in the life of his debtor.

(2) This interest cannot exceed in amount that of the indebtedness to be secured. (a) Such indebtedness may, however, include the cost of taking out and keeping up the insurance, if made a charge against the debtor or his estate, or upon the proceeds of the property when collected.'

In Quillan v. Johnson, 122 Ga. 49; 49 S. E. 801 the Supreme Court of Georgia holds that "Irrespective of whether or not the owner and holder of a policy of insurance on his own life may legally sell and assign the policy to one having no insurable interest in his life, the policy holder is certainly not at liberty to make the policy the subject matter of a purely wagering or speculative contract between himself and a person having no interest therein.'

In Hinds v. Bank & Trust Company, 120 Ga. 711; 48 S. E. 120 the Supreme Court of Georgia holds, that the mere knowledge of the lender of money, that the borrower intends to use it for an illegal or immoral purpose, will not prevent a recovery of the money loaned, unless the lender participated in the illegal transaction or did something to further the consummation of the unlawful design.'

Conclusions of Law.

The first assignment of error is as follows:

"The court erred in rendering judgment for the plaintiff for any amount, because the evidence shows conclusively that the defendant Insurance Company had paid the full amount due on the life insurance policies to J. H. Hilsman who, in any view of the law or facts, had at least sufficient interest in said policies to authorize him to collect the same, and the payment to Hilsman dis-
65 charged the Insurance Company from liability, and any claim that plaintiff may have is against Hilsman, and not against the Insurance Company."

Under the assignment is asserted this proposition:

"A life insurance company may rightfully pay the amount of a policy to an assignee holding the apparent legal title conferred by the insured, or other legal owner of the policy, and such payment discharges the insurance company from liability, regardless of any equities that may exist between the assignee and the original holder of the policy."

It is a general rule that one who has no insurable interest in the life of another may not take out an insurance policy upon it, and if he does the policy is void as against public policy. But where the policy is taken out by the insured himself for his own benefit, there is an irreconcilable conflict in the authorities upon the question as to whether he may make a valid assignment of it to one who has no insurable interest in the life of the assured. This conflict grows out of the general rule above stated. In some jurisdictions it is held that the same principle of public policy which inhibits one from insuring the life of a person in whom he has no insurable interest forbids him from taking an assignment of a policy taken out by the insured for his own benefit. In others it is held that such an assignment is not affected by public policy, and that it is of the same validity as the assignment of any other chattel. There are modifications and exceptions to either rule, of which we need only notice such as may affect the disposition of this case.

In this State, an assignment of such a policy to one without an insurable interest is regarded as valid only to the extent of reimbursing the assignee for amounts paid out by him with interest. If the assignee has paid out nothing for which he is in
66 equity entitled to be reimbursed, the assignment is void; but if he has, because of the benefit received by the beneficiary or the estate of the insured, the assignee is allowed such reimbursements, and the balance of the insurance money goes to the estate

or the beneficiary. The ground for holding the assignment void, except for the purpose of reimbursing the assignee, is that such transaction is a mere gambling contract, and that it is against public policy to create an interest in the early death of the insured on the part of one having no corresponding interest in his life, which is the case where the policy is assigned for an amount less than its face value. Coleman v. Anderson, 97 Tex. 569, 86 S. W. 730, 82 S. W. 1057; Kelly v. Searcy 100 Tex. 571, 102 S. W. 100; Cheeves v. Andres, 87 Tex. 291; Insurance Co. v. Hazlewood, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893; Shonfield v. Turner, 75 Tex. 329, 12 S. W. 626, 7 L. R. A. 189; Cawthon vs. Perry 76 Tex. 383, 13 S. W. 268; Cameron v. Barcus, 71 S. W. 433; Dugger vs. Insurance Co. 81 S. W. 335; Fletcher v. Williams 66 S. W. 861; Walton v. Ins. Co. 34 Tex. Civ. App. 156, 78 S. W. 403.

The courts of Alabama, Kansas, Kentucky, Missouri, Pennsylvania and Virginia hold with Texas that such assignments are invalid on the ground that they are opposed to public policy. Alabama Gold L. Ins. Co. v. Mobile Mut. Ins. Co. 81, Ala. 329, 1 So. 561; Helmetag v. Miller, 76 Ala. 183, 52 Am. Rep. 316; Missouri Valley L. Ins. Co. v. Sturges, 18 Kan. 97, 26 Am. Rep. 761; Ins. Co. v. McCrum, 36 Kan. 146, 59 Am. Rep. 537, 12 Pac. 517; Met. L. Ins. Co. v. Ellison, 83 Pac. 410; 3 L. R. A. (N. S.) 935; Basye v. Adams, 81 Ky. 368; Beard v. Sharp, 100 Ky. 606, 38 S. W. 1057; Bromley v. Washington, 91 S. W. 17; Mutual Life Ins. Co. v. Richardson, 99 Mo. App. 88, 72 S. W. 487; Downey v. Hoffer, 110 Pa. 109, 20 Atl. 655; Keystone Mut. Ben. Association v. Norris, 115 Pa. 446, 2 Am. St. Rep. 573, 8 Atl. 638; Gilbert v. Moose, 104 Pa. 74, 49 Am. Rep. 470; Hoffman v. Hoke, 122 Pa. 377, 15 Atl. 437; Tate v. Commercial Association, 97 Va. 74, 45 L. R. A. 243,
67 75 Am. St. Rep. 770, 33 S. E. 382; Roller v. Beam, 86 Va. 512, 6 L. R. A. 136; 10 S. E. 241.

But the rule in Georgia is that the assignment of a life insurance policy to one having no insurable interest is valid, when the assignment is not made by way of cover for a wager policy, as is seen by the decisions of her courts and statutes introduced in evidence in this case This seems to be the law in the majority of the states. According to this theory, an assignment to any person is valid in the same manner and to the same extent as an assignment of any other chose in action would be; and the assignee takes the entire interest in the policy. The reason upon which this theory is based is that were it otherwise insurances of lives would lose much of their value and usefulness.

For cases and case notes presenting these two conflicting theories, attention is specially called to Metropolitan L. Ins. Co. v. Elson, 3 L. R. A. (N. S.) 935 and Rylander v. Allen, 6 L. R. A. (N. S.) 129, as reported and edited in that splendid series of reports.

Before considering the question as to which of these conflicting theories—that of Texas or of Georgia—is applicable to the assignment of the policies involved in this case, we will first dispose of appellant's contention that even under the rule which obtains in

this State, as applied by its courts, appellant was authorized to pay the amount due on the policies to Hilsman, the assignee.

To sustain the contention, appellant relies on Schonfield v. Turner, Cheeves v. Andres, and Ins. Co. v. Williams, supra, which hold in substance, that an assignee or a named beneficiary of a life insurance company, who has no insurable interest in the life of the assured, may nevertheless collect the policy and after appro-
68 priating what he may be entitled to receive of the proceeds, pay the balance to the estate of the insured or to those entitled to receive the same.

This is on the principle that he holds the policy in trust for those who are under the law justly entitled to the proceeds, and as such trustee may collect the amount due, the proceeds when collected being charged in his hands with the trust in favor of those who are in law and equity entitled to the same.

But that doctrine can have no application in this case. Here, as admitted by the defendant in the agreement upon which the case was tried, the Insurance Company knew when it paid Hilsman the face value of the policies that he claimed them as his own adversely to the estate of the insured; that as the owner, he claimed he was entitled to the entire amount, less the sum of the loans due the insurer, as his own property independent of the claims of the executor of the estate of Jacob Cohen; and that when paid to him that he would hold the same as his own without recognition of the trust in favor of those who were equitably entitled to the benefit of such funds. In other words, with full knowledge of the claim of Cohen's executor to the amount due on the policies, and the ground upon which it was based, and that Hilsman denied the existence of the trust that equity charged him with, and of his entire repudiation of the same and that he would appropriate the proceeds of the policy to his own exclusive benefit in violation of the right of the insured's executor therein, it paid the face value of the policies to him. Thus aiding and abetting and enabling him to acquire possession of money which the law charged it with knowledge that the fund belonged to the insured's estate, well knowing that Hillsman would hold it against the rights of the real owner. The Company's hands are not clean, for they have given to one money to keep which it knew was not his, but another's. There are no waters nor lotions in a
69 court of equity with which foul hands can be cleansed.

Since the Insurance Company took indemnity from Hilsman for the wrong done the plaintiff executor, and is now defending this suit in his interest rather than its own, it must be regarded as standing in his shoes, and it can no more be heard to say that it had the right to pay the money to him than he could, were he before the court defending this action. If he could successfully defend it, the Company can; if not, the Company cannot.

This brings us to a consideration of the question, whether the law of Texas or of Georgia, in regard to the validity of the assignments, obtains in this case. The solution of this question will require an inquiry into the principles arising from conflict of laws of different jurisdictions, in their application to transactions of the character under consideration.

There is also a conflict in the authorities as to what law governs in determining the validity of an assignment of an insurance policy. If the question has ever been decided in this state the writer cannot recall the decision. But the principle established by the weight of authority seems to be that an assignment of a policy of insurance, or the benefit thereunder, is a contract distinct and separate from the original contract of insurance and is governed by the law of the place where the assignment was made, without reference to the place where the original contract was made, or to the law governing the contract. 2 Wharton Conf. of Laws, 467*g*. See the entire section and the authorities cited in notes for the rule stated and its exceptions and limitations. See also Johnson v. Mutual Life Ins. Co. 63 L. R. A. 833 especially note "*h*" page 858.

We take it that the evidence establishes beyond dispute that the assignment of the policies here involved was made in Texas
70 and that it is governed by the rule stated. Hence, the liability of the Insurance Company on the policies is determinable by the laws of this state and not of Georgia.

Even if the assignment of the policies had been made in the State of Georgia, and it should be held valid under the laws of that State, it may be doubted whether, on account of its being contrary to the distinctive policy of the forum in which this suit was brought, such laws would be given effect by the courts of Texas, 1 Whart. on Conflict of Laws §4*a*. For the same principle upon which the policy of this State is based, i. e. to protect the life of its citizens against the temptation of an assignee of a life policy who has no insurable interest in the life of the insured to shorten its duration, might be held to obtain in its forum, regardless of where the assignment was made. Barry, v. Equi. Ins. Co. 59 N. Y. 587.

But it is doubtful whether, in view of the disparity between the amount paid by Hilsman for the policies and the amount due and collected on the policy by him—the amount paid being only $460.00 and the sum collected by him being $5,750.00, an excess of $5,290.00—whether the courts of Georgia would not hold the contract of assignment "purely a wagering or speculative contract" between the insured and the assignee who had no insurable interest in the former's life. It is indicated in the case of Quillan v. Johnson, 122 Ga. 49, 49 S. E. 801, introduced in evidence by the plaintiff, that such would be their holding, and we think from the weight of the authorities, which we have not time to fully consider or cite, that it ought to be. Beach on Ins. § 1142, May on Ins. §§ 73, 74, 75.

However, in our view of the case we deem it unnecessary to decide either of these questions.

What we have said in considering the first assignment of
71 error also disposes of the second, under which it is contended by appellant that the assignment of the policies was a Georgia contract and all questions as to its validity and effect should be determined by the laws of that State. If, as this assignment assumes, the assignment of the policies was a Georgia contract, it may be that the plaintiff would not be entitled to recover anything. But such assumption is fallacious. As is said by the counter-proposition of appellee under this assignment:

"Neither the payment of the purchase price of the policies, or their delivery to Hilsman, was necessary to pass title, and, therefore the terms having been agreed upon by Cohen and Hilsman's agent at San Antonio, the assignment having been executed there and delivered to a bank in that city by Hilsman's instructions, the contract was not only entered into, but was consummated in Texas."

This is fortified and sustained by these authorities: Mechem on Sales, Vol. 1, Sec. 483-4; Rail v. Little River Falls Lbr. Co., 50 N. W. 471; Embree McLean Car. Co. vs. Lusk, 11 Tex. Civ. App. 493; Am. & Eng. Ency. of Law, Vol. 24, p. 1052; Beardsley vs. Beardsley, 138 U. S. 262; State v. Rosenberger, 111 S. W. 511; Wheless vs. Myer, 120 S. W. (Mo.) 712; Henline vs. Hall, 4 Ind. 189; Sweeney vs. Ousley, 53 Ky., 413; Jenkins vs. Jarrett, 70 N. E. 255; Morey vs. Midbury, 10 Hun. (N. Y.) 540.—and the argument of his counsel under it. While other counter-propositions are advanced, we think the first sufficiently answers appellant's contention.

The third assignment is:

"The court erred in rendering judgment for plaintiff for any amount, because the evidence shows that the insurance policies were transferred by the insured to J. H. Hilsman as part of an illegal transaction, of such a character that plaintiff is entitled to no relief in law or in equity."

Under it this proposition is asserted:

72 "When an insurance policy is assigned as part of a gaming transaction, the law will give no relief to either party, or to their heirs, executors or assigns, regardless of all other questions, but will leave the parties where they have voluntarily placed themselves."

The principle of law enunciated by the proposition has no application to this case; but on the contrary, the principle enunciated in appellee's counter-proposition, which is: "The consideration for the assignment of these policies having been advanced by Hilsman for the express purpose of assisting the insured to participate in a gambling transaction with said Hilsman and his agent at San Antonio, Texas, the consideration was void in law and the attempted assignment of the policies for that reason alone vested no right in Hilsman to either the policies or the proceeds thereof"—obtains. Acts Texas Legis., 1907, page 132; Norris vs. Logan, 97 S. W. Rep. 20; Jones vs. Aiken, 80 S. W. 285; Seeligson vs. Lewis, 63 Texas 220; Hines vs. Bank & Trust Co., 120 Ga. 711, 48 S. E. — ; Bigelow vs. Benedict, 70 N. Y. 206; Storey vs. Solomon, 71 N. Y. 422; Civil Code of Georgia, Sec. 3668; Quillan vs. Johnson, 122 Ga. 49, S. E. 801.

The principle that a court will not enforce an illegal contract, is applied between the parties to that contract only. The law leaves them in the same attitude they have placed themselves in, declining to have anything to do with a transaction which it denounces as illegal. To illustrate: If the contract of assignment between Jacob Cohen and J. H. Hilsman had been breached by either party i. e. if the former had received the consideration and refused to assign the policies to the latter, or if the latter had received the policies under the assignment from the former and refused to pay the consideration,—the law would have aided neither in enforcing the agreement as against the other.

But here it is the contract of insurance, made between the
73 Insurance Company and the insured, that is sought to be enforced by the latter's executor to which Hilsman was in no way a party. Had he sought to enforce it through the medium of the courts he would have been met by the inquiry, "What right have you to the money due on these policies?" His only true answer would have been, "I own them under an assignment from the beneficiary, which the law denounces as illegal and pronounces as void." Then, would the court say unto him: "Depart from me, ye wicked, I know you not."

It would be preposterous to hold that that which is void as against public policy can be validated by a contract which is also void as against public policy. If the doctrine that "an estoppel against an estoppel sets the matter at large, obtains it may not relieve the appellant from its embarassed position in which it has placed itself by paying Hilsman the money due on policies on an assignment to him which is doubly void i. e., void for two separate and distinct reasons, each having its foundation in sound public policy.

In this connection we will dispose of the assignment which complains of the court's refusal to allow the defendant credit for the $4460.00 paid by Hilsman to the insured from date of such payment. It is seen from what we have said that, as the contract of assignment under which this money was paid was void for two grounds, and for that reason, conferred no right to or interest in the policies in the assignee, and the payment of the money to him was as though it had been made to a stranger. This can afford no defense to the action of the executor of the estate of the insured for the entire amount due on the policies.

The remaining assignments complain of the court's adjudging
74 the attorney's fees and statutory damages under Art. 3071 Rev. Stats. of 1895, against the defendant. This statute is assailed upon the ground that it contravenes the Fourteenth Amendment of the Constitution of the United States. The supreme court of the United States has held to the contrary. Fidelity Mut. L. Association v. Mettler, 189 U. S. 150, 46 L. Ed. 922, see also Farmers & M. Ins. Co. v. Dubuey 189 U. S. 301, 47 L. ed. 822. With the exception of Ins. Co. v. Smith, 41 S. W. 684; such has been the uniform holding of the courts in this State. Ins. Co. v. Chowning 86 Tex. 654, 24 L. R. A. 504, 26 S. W. 982; Mutual L. Ins. Co. v. Bloigett 27 S. W. 286; Fidelity & C. Co. vs. Allibone 90 Tex. 680; Woodmen of the World vs. Garrington, 90 S. W. 921; Penn. Mut. L. Ins. Co. v. Maner, 101 Tex. 553, 109 S. W. 1084; Ins. Co. v. Jay 109 S. W. 1117.

As is said in Ins. Co. v. Jay, supra: "The additional 12% upon the amount of the policy therein provided for (referring to Art. 3071 Rev. Stats.) is not pronounced a penalty, but is declared 'damages' and every contract of insurance of the nature of the one under consideration entered into in this state is made in view of this Article and its provisions enter into and form a part of it". The action of the Insurance Company in paying the money due on the policies was not, as in Ins. Co. v. Woods Nat. Bank 107 S. W. 119, an offer

of the Insurance Company to pay to the one of the two real claimants when it should be determined whom he was, but a voluntary payment to the rival claimant who had no right whatever to the amount due on the policy. The Company has indemnified itself against its act in paying the money due on the policy to one who was not entitled to receive it; now let it resort to its indemnity.

The judgment is affirmed.

H. H. NEILL,
Associate Justice.

Opinion delivered and filed May 31, 1911.

(Endorsed:) No. 4659. In Court of Civil Appeals, Fourth 75 Supreme Judicial District of Texas, San Antonio. Manhattan Life Ins. Company, Appellant, vs. David Cohen, Executor, Appellee. From Harris County. Opinion by H. H. Neill, Associate Justice. Filed in the Court of Civil Appeals, at San Antonio, Texas, Jos. Murray, Clerk. Filed in Supreme Court July 3rd, 1911. F. T. Connerly, Clerk.

Judgment.

WEDNESDAY, *May 31st, A. D.* 1911.

No. 4659.

MANHATTAN LIFE INS. CO., Appellant,
vs.
DAVID COHEN, Executor, Appellee.

Appeal from District Court Harris County.

This cause came on to be heard on the transcript of the record and the same being inspected because it is the opinion of the court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellee David Cohen, Executor, do have and recover of and from the appellant Manhattan Life Insurance Company and its surety The United States Fidelity and Guaranty Company, the amount adjudged by the court below, and all costs in this behalf incurred and this decision be certified below for observance.

Appellant's Motion for Rehearing.

Filed June 12, 1911.

76 In Court of Civil Appeals, Fourth Supreme Judicial District of Texas, at San Antonio.

No. 4659.

MANHATTAN LIFE INSURANCE COMPANY, Appellant,
vs.
DAVID COHEN, Executor, Appellee.

Appellant's Motion for Rehearing.

To the Honorable Court aforesaid:

Now comes appellant, The Manhattan Life Insurance Company of New York, and respectfully prays that the court set aside the judgment heretofore rendered herein, and grant it a rehearing, for the following reasons, to-wit:

I.

The Court erred in not sustaining appellant's first assignment of error reading as follows:

"The court erred in rendering judgment for the plaintiff for any amount, because the evidence shows conclusively that the defendant Insurance Company had paid the full amount due on the life insurance policies to J. H. Hilsman who, in any view of the law or facts, had at least sufficient interest in said policies to authorize him to collect the same, and the payment to Hilsman discharged the Insurance Company from liability, and any claim that plaintiff may have is against Hilsman, and not against the Insurance Company".

II.

The court erred in its opinion in holding and concluding as follows:

"Here, as admitted by the defendant in the agreement upon which the case was tried, the Insurance Company knew when it paid Hilsman the face value of the policies that he claimed them as his own adversely to the estate of the insured; that as the owner,
77 he claimed he was entitled to the entire amount, less the sum of the loans due the insurer, as his own property independent of the claims of the executor of the estate of Jacob Cohen; and that when paid to him he would hold the same as his own without recognition of the trust in favor of those who were equitably entitled to the benefit of such funds. In other words, with full knowledge of the claim of Cohen's executor to the amount due on the policies, and the ground upon which it was based, and that Hilsman denied the existence of the trust that equity charged him with, and of his entire repudiation of the same and that he would appropriate the proceeds

of the policy to his own exclusive benefit in violation of the right of the insured's executor therein, it paid the face value of the policies to him. Thus aiding and abetting and enabling him to acquire possession of money of which the law charged it with knowledge that the fund belonged to the insured's estate, well knowing that Hilsman would hold it against the rights of the real owner. The Company's hands are not clean for they have given to one money to keep which it knew was not his but another's. There are no waters nor lotions in a court of equity with which foul hands can be cleansed."

The court erred in that part of its opinion above quoted, because it is wholly unsupported by anything in the record, and in direct conflict with the record. The record merely shows that the Insurance Company knew that "Hilsman claimed the right to receive (collect) the face of the policies, less said $1,750 loan,"—a right this court admits he had by virtue of his interest in the policies, and there is absolutely not a word in the record to support the conclusion that when the money was paid to Hilsman by the Insurance Company it had any knowledge or notice that Hilsman intended to do or claim more than this court at least in one part of its
78 opinion, admits was his right. The expression in the opinion that "there are no waters nor lotions in a court of equity with which foul hands can be cleansed" is not intended to apply to appellant, is wholly irrelevant, and if intended to apply to appellant, is wholly unwarranted, and subject to the most earnest and serious exception. The record not only contains no warrant for such expressions or conclusions, but it affirmatively and conclusively rebuts even any just suspicion of the existence of such facts as would provoke such extreme language, because the record affirmatively and conclusively shows that the Insurance Company did everything in its power to avoid becoming a party to the controversy between Cohen and Hilsman; that the Insurance Company admitted liability for the face of the policies, less the amount of said loans, and offered to pay the same to the joint order of the rival claimants, or to pay the money into court if the matter could be so arranged that the parties would appear and interplead in a court of competent jurisdiction where any judgment that might be rendered would fully protect the Insurance Company from double liability" and that "it was not the purpose of the Insurance Company to contest or delay payment," and that it was within the power of Cohen, by bringing suit in Georgia, where the Insurance Company offered to appear, to have an adjudication of all controversies with all parties before the court, that Cohen refused to do this, that under the rule established in Washington Life Insurance Company v. Gooding, 49 S. W. 123, it was beyond the power of the Insurance Company to compel an interpleader, and that the Insurance Company could not have done otherwise than it did do except to litigate one suit in Texas and another suit in Georgia, at the imminent risk of being compelled to pay twice, as in Washington Life Insurance Company v. Gooding, supra.

III.

79 The court erred in its opinion in holding and concluding as follows:

"Since the Insurance Company took indemnity from Hilsman for the wrong done the plaintiff executor, and is now defending this suit in his interest rather than its own, it must be regarded as standing in his shoes, and it can no more be heard to say that it had the right to pay the money to him than he could were he before the court defending this action. If we could successfully defend it, the Company can; if not, the Company cannot."

The above quotation is erroneous because—

(*a*) In merely collecting the policies, which is all that Hilsman has actually done, he was only exercising his clear legal right, and doing no wrong to plaintiff or anybody else.

(*b*) There is no warrant in the record for the statement that the Insurance Company is now defending this suit in Hilsman's interest rather than its own, the mere fact that Hilsman gave the Insurance Company an indemnity bond not constituting such warrant, because the character of such bond, the extent of the indemnity and whether or not it is sufficient, are matters upon which the record is silent, and the indemnity bond, in this case, is a wholly immaterial and irrelevant matter.

(*c*) It is wholly erroneous to say, in effect, that the issue between Cohen and Hilsman is the same as the issue between Cohen and the Insurance Company.

IV.

The court erred in concluding that "the assignment of the policies here involved was made in Texas," because the record shows conclusively that the assignment was actually delivered in Georgia, and that it was wholly without effect until such delivery.

V.

80 The court erred in intimating, if not actually concluding, that under the laws of Georgia the assignment of the policies was not valid.

VI.

The court erred in not sustaining appellant's second assignment of error as follows:

"The court erred in rendering judgment for plaintiff for any amount because the evidence shows conclusively that the insurance policies were transferred to J. H. Hilsman by valid transfers delivered and consummated in the State of Georgia; that under the laws of Georgia such transfers were valid and that plaintiff has no interest in said policies."

VII.

The court erred in not sustaining appellant's third assignment of error as follows:

"The court erred in rendering judgment for plaintiff for any amount because the evidence shows that the insurance policies were transferred by the insured to J. H. Hilsman as part of an illegal transaction, of such a character that plaintiff is entitled to no relief in law or equity."

VIII.

The court erred in holding that the "Principle that a court will not enforce an illegal contract is applied between the parties to that contract only."

IX.

The court erred in not sustaining appellant's fourth assignment of error reading as follows:

"The court in rendering judgment for plaintiff for statutory damages and for attorney's fees, because there is no evidence that the Insurance Company failed to pay the policies within the time specified in the policies after demand was made therefor, within the true spirit and proper construction of the statute, and the evidence
81 shows that there was no such failure or refusal to pay as is contemplated by the statute."

X.

The court erred in not sustaining appellant's fifth assignment of error reading as follows:

"The court erred in rendering judgment for plaintiff for statutory damages and for attorney's fees, because the Texas Statute, Revised Statutes Art. 3071, as construed in this case, is in conflict with and in violation of Section 1, Article 14, of the Amendments to the Constitution of the United States."

XI.

The court erred in not sustaining appellant's seventh assignment of error reading as follows:

"The Court erred in failing and refusing to allow credit for the $460.00 paid by J. H. Hilsman to the insured, and interest thereon from date of such payment, and the judgment of the court is excessive."

For the foregoing reasons appellant respectfully prays that it be granted a rehearing, that each and all of the foregoing assignments of error be sustained, and that the judgment of this court heretofore rendered be reversed.

Mr. W. S. Hunt and the firm of Hunt, Myer & Teagle, all of whom reside at Houston, Harris County, Texas, are counsel for appellee.

Respectfully submitted,

W. J. MORONEY,
Attorney for Appellant, Manhattan Life Insurance Company of New York.

(Endorsed:) No. 4659. Manhattan Life Insurance Co., Appellant, vs. David Cohen, Executor, Appellee. Appellant's Motion for

rehearing. Filed in the Court of Civil Appeals, at San Antonio, Texas, June 12, 1911. Jos. Murray, Clerk. Filed in Supreme Court, July 31st, 1911. F. T. Connerly, Clerk.

82 *Order Overruling Motion for Rehearing.*

No. 4659.

MANHATTAN LIFE INS. CO., Appellant,
vs.
DAVID COHEN, Extr., Appellee.

Appeal from Harris.

WEDNESDAY, *June 21st, A. D.*, 1911.

The motion of appellant for a rehearing filed June 12th, 1911, coming on to be heard, and the court having duly considered the same, it is ordered that said motion be and it is hereby overruled; it is further ordered that appellant Manhattan Life Insurance Company and its surety The United States Fidelity and Guaranty Company pay all costs of this motion.

Petition of Appellant to Supreme Court for Writ of Error.

In Court of Civil Appeals, Fourth Supreme Judicial District of Texas, at San Antonio.

No. 4659.

MANHATTAN LIFE INSURANCE COMPANY, Appellant,
vs.
DAVID COHEN, Executor, Appellee.

Petition of Appellant to Supreme Court for Writ of Error.

To the Honorable Supreme Court of the State of Texas:—

Your petitioner, The Manhattan Life Insurance Company of New York, respectfully alleges that this is a suit originally brought in the 11th Judicial District Court of Harris County, Texas, by David Cohen, independent executor of the estate of Jacob Cohen, deceased, against said Insurance Company, to recover the principal and interest of two life insurance policies for $3,750.00 each issued by
83 the Insurance Company on the life of Jacob Cohen. Plaintiff also prayed for statutory damages and attorney's fees.

The answer of the Insurance Company alleged that Jacob Cohen had borrowed $875.00 from the Insurance Company on each of said policies, that he had then sold the policies to J. H. Hilsman of Atlanta, Georgia, for $400.00, and that the Insurance Company had paid to Hilsman the face of said policies, less the amount of the loans

thereon. The answer alleged these facts at length, as well as other facts to be hereinafter referred to. The suit was tried by the court without a jury. The Court held that the assignment to Hilsman was void, refused to give credit for the $460.00 paid by Hilsman to Cohen, and rendered judgment in favor of plaintiff for the face of the policies, less the amount of the loans thereon, to-wit, $5,750, with 6% interest from June 10, 1908, total, $6,459.17, and $690.00 damages, and $700.00 attorney's fees, with 6% interest from date of judgment, and costs of suit.

By proper proceedings the Insurance Company appealed and assigned errors and the suit on appeal was transferred to said Court of Civil Appeals at San Antonio.

On May 31, 1911, said Court of Civil Appeals affirmed said judgment and filed a written opinion.

On June 12, 1911, said Insurance Company filed its motion for rehearing, which was overruled on June 21, 1911, without written opinion.

Petitioner now prays for a writ of error to review said judgment and orders of said Court of Civil Appeals, for the following reasons, to-wit:

First Assignment of Error.

The Court of Civil Appeals erred in not sustaining appellant's first assignment of error, reading as follows:

"The court erred in rendering judgment for the plaintiff
84 for any amount, because the evidence shows conclusively that the defendant Insurance Company had paid the full amount due on the life insurance policies to J. H. Hilsman, who, in any view of the law or facts, had at least sufficient interest in said policies to authorize him to collect the same, and the payment to Hilsman discharged the Insurance Company from liability, and any claim that plaintiff may have is against Hilsman, and not against the Insurance Company."

Memorandum: This was the first ground of error assigned in petitioner's motion for re-hearing. See Schonfield v. Turner, 75 Tex. 324, Cheever v. Anders, 87 Tex. 287; Pacific Mutual Ins. Co. v. Williams, 79 Tex. 633. These authorities are directly in point as shown by appellant's brief pages 20-24.

Second Assignment of Error.

The Court of Civil Appeals erred in holding and concluding as follows:

"Here, as admitted by the defendant in the agreement upon which the case was tried, the Insurance Company knew when it paid Hilsman the face value of the policies that he claimed them as his own adversely to the estate of the insured; that as the owner he claimed he was entitled to the entire amount, less the sum of the loans due the insurer, as his own property independent of the claims of the executor of the estate of Jacob Cohen; and that when paid to him

he would hold the same as his own without recognition of the trust in favor of those who were equitably entitled to the benefit of such funds. In other words, with full knowledge of the claims of Cohen's executor to the amount due on the policies, and the ground upon which it was based, and that Hilsman denied the existence of the trust that equity charged him with, and of his entire repudiation of the same, and that he would appropriate the proceeds of the policy to his own exclusive benefit in violation of the right of the
85 insured's executor therein, it paid the face value of the policies to him. Thus aiding and abetting and enabling him to acquire possession of money of which the law charged it with knowledge that the fund belonged to the insured's estate, well knowing that Hilsman would hold it against the rights of the real owner. The Company's hands are not clean, for they have given to one money to keep which it knew was not his but another's. There are no waters nor lotions in a court of equity with which foul hands can be cleansed."

The court erred in that part of its opinion above quoted, because it is wholly unsupported by anything in the record, and in direct conflict with the record. The record merely shows that the Insurance Company knew that "Hilsman claimed the right to receive (collect) the face of the policies, less said $1,750 loan"—a right this court admits he had by virtue of his interest in the policies, and there is absolutely not a word in the record to support the conclusion that when the money was paid to Hilsman by the Insurance Company it had any knowledge or notice that Hilsman intended to do or claim more than this court (at least in one part of its opinion) admits was his right. The expression in the opinion *in the opinion* that "there are no waters nor lotions in a court of equity with which foul hands can be cleansed" if not intended to apply to appellant, is wholly irrelevant, and if intended to apply to appellant, is wholly unwarranted, and subject to the most earnest and serious exception. The record not only contains no warrant for such expressions or conclusions, but it affirmatively and conclusively rebuts even any just suspicion of the existence of such facts as would provoke such extreme language because the record affirmatively and conclusively shows that the Insurance Company did everything in its power to avoid becoming a party to the controversy between Cohen and
86 Hilsman; that the Insurance Company admitted liability for the face of the policies, less the amount of said loans, and offered to pay the same to the joint order of the rival claimants, or to pay the money into Court, if the matter could be so arranged that the parties would appear and interplead in a court of competent jurisdiction where any judgment that might be rendered would fully protect the Insurance Company from double liability, and that "it was not the purpose of the Insurance Company to contest or delay payment," and that it was within the power of Cohen, by bringing suit in Georgia, where the Insurance Company offered to appear, to have an adjudication of all controversies with all parties before the court, that Cohen refused to do this, that under the rule established in Washington Life Insurance Company v. Gooding, 49 S. W. 123,

it was beyond the power of the Insurance Company to compel an interpleader, and that the Insurance Company could not have done otherwise than it did do except to litigate one suit in Texas and another suit in Georgia, at the imminent risk of being compelled to pay twice, as in Washington Life Insurance Company v. Gooding, supra.

MEMORANDUM.—As the facts are correctly stated in that part of the opinion of the Court of Civil Appeals preceding the conclusions of law, no additional statement is necessary. The above quotation was assigned as error in motion for rehearing. There is not a scintilla of evidence in the record to support or warrant any such language as applied to the Insurance Company. The record, however, does show that Cohen's hands were not clean, if cotton futures gambling is unclean. We have read somewhere of a police judge who became eloquent with good resolutions after celebrating the New Year, but inadvertently got his wires crossed and sent to jail the victim of an assault, instead of the assailant, all of which merely shows that there is nothing new under the sun, and that the eloquent utterance of noble sentiment- is entirely separable from their correct application. The Supreme Court of Texas, in decisions heretofore rendered, has been much more discriminating, if also much less eloquent, on deciding questions of this character, as shown by Beer v. Landman, 88 Tex. 450, and other cases cited in our brief, page 28.

Third Assignment of Error.

The Court of Civil Appeals erred in its opinion in holding and concluding as follows:

"Since the Insurance Company took indemnity from Hilsman for the wrong done the plaintiff executor, and is now defending the suit in his interest rather than its own, it must be regarded as standing in his shoes, and it can no more be heard to say that it had the right to pay the money to him than he could were he before the court defending this action. If he could successfully defend it, the Company can; if not, the Company cannot."

The above quotation is erroneous because—

(*a*) In merely collecting the policies, which is all that Hilsman has actually done, he was only exercising his clear legal right, and doing no wrong to plaintiff or anybody else.

(*b*) There is no warrant in the record for the statement that the Insurance Company is now defending this suit in Hilsman's interest rather than its own, the mere fact that Hilsman gave the Insurance Company an indemnity bond not constituting such warrant, because the character of such bond, the extent of the indemnity, and whether or not it is sufficient, are matters upon which the record is silent, and the indemnity bond, in this case, is a wholly immaterial and irrelevant matter.

(*c*) It is wholly erroneous to say, in effect, that the issue between Cohen and Hilsman is the same as the issue between Cohen and the Insurance Company.

Statement.

The criticisms in the above assignment of the Court's opinion, whether they be legally sound or not, are at least sustained
88 by the record. All the facts in evidence are stated in the court's opinion. The record merely shows that Hilsman gave the Insurance Company some sort of an indemnity bond. The amount and conditions of the bond, the character and extent of the indemnity, the sufficiency or insufficiency of the sureties, are all matters upon which the record is absolutely silent. The record does show however, that if the judgment in this case shall stand the Insurance Company will be compelled to pay the same debt twice. Whether or not, in the event it will ever get the money back is wholly a matter of speculation, which we respectfully submit has nothing to do with this case.

Fourth Assignment of Error.

The Court of Civil Appeals erred in overruling appellant's fourth assignment of error in motion for re-hearing, reading as follows:

"The court erred in concluding that the assignment of the policies here involved was made in Texas, because the record shows conclusively that the assignment was actually delivered in Georgia, and that it was wholly without effect until such delivery".

REMARKS.—That the above assignment is well founded appears to us to be too clear for argument. The executory agreement to assign the policies was indeed made in Texas, but if this agreement was void, it was certainly without effect, and whether valid or void it was superseded by the executed contract upon which appellant relies, and which was delivered in Georgia, and is therefore a Georgia contract.

Fifth Assignment of Error.

The Court of Civil Appeals erred in overruling appellant's fifth assignment of error in motion for rehearing as follows:

"The Court erred in intimating, if not actually concluding, that under the laws of Georgia the assignment of the policies
89 was not valid".

REMARKS.—The statutes and the decisions of Georgia, introduced in evidence and quoted in the opinion of the Court of Civil Appeals, shows conclusively that under the laws of Georgia the assignment of the policies was valid, and that Hilsman, while in his own state, made and performed a contract that according to the laws of that state was absolutely valid, but which the Court of Civil Appeals now pronounces void.

Sixth Assignment of Error.

The Court of Civil Appeals erred in overruling appellant's sixth assignment of error, in motion for rehearing, reading as follows:

"The Court erred in not sustaining appellant's second assignment of error, as follows:

"The court erred in rendering judgment for plaintiff for any amount, because the evidence shows conclusively that the insurance policies were transferred to J. H. Hilsman by valid transfers delivered and consummated in the State of Georgia; that under the laws of Georgia such transfers were valid, and that plaintiff had no interest in said policies."

Seventh Assignment of Error.

The Court of Civil Appeals erred in overruling appellant's seventh assignment of error, in motion for rehearing, reading as follows:

"The court erred in not sustaining appellant's third assignment of error, as follows:

"The court erred in rendering judgment for plaintiff for any amount, because the evidence shows that the insurance policies were transferred by the insured to J. H. Hilsman as a part of an illegal transaction, of such a character that plaintiff is entitled to no relief in law or equity."

90 *Eighth Assignment of Error.*

The Court of Civil Appeals erred in overruling appellant's eighth assignment of error in motion for rehearing, reading as follows:

"The court erred in holding that the "principle that a court will not enforce an illegal contract is applied between the parties to that contract only".

REMARKS.—It is earnestly submitted that the Court of Civil Appeals not only undertakes, in effect, to overrule a well settled and uniform line of decisions of the Supreme Court of Texas, cited in appellant's brief, page 28, but in place of such law substitutes a proposition never heard of before in the law books, and which is not even found in the able brief of opposing counsel. If the legal consequences of admitted illegality can be avoided by merely saying "forget it", if a wrong can be converted into a right by a mere change of parties, and if the blame of Cohen's gambling can be fastened on the Insurance Company that had absolutely no knowledge of or connection with it, then we must be now living in "Topsy Turvy Land."

In Beer v. Landman, 88 Tex. 450, the court held that collaterals delivered in cotton futures transaction could not be recovered.

The Court of Civil Appeal undertakes to overcome the force of this decision by flanking it, declaring that "here it is the contract of insurance, made between the Insurance Company and the insured, that is sought to be enforced by the latter's executor, to which Hilsman was in no way a party"; in other words, the consequences of illegality may be escaped by merely saying "please don't mention it; we will forget that chapter and start all over again". The fact

that reasoning of this character is found in the opinion of the Court of Civil Appeals renders it at least not inappropriate to consider it seriously.

The case of Beer v. Landman, 88 Tex. 150, is direct
91 authority for the following propositions:

1. That while a gambling transaction arising out of speculation in cotton futures in contrary to public policy, an executed contract of this character under which securities are equally transferred vests the legal title to such securities in the party to whom they are transferred.

2. That the illegality of the transaction is a complete bar in law and in equity to the recovery of such securities.

3. That plaintiff cannot recover when it is necessary for him to prove, as a part of his cause of action, his own illegal contract or other illegal transaction.

The only distinction between this case and the case of Beer vs. Landman is a distinction without a difference. "Of course as the policies in suit belonged to the estate of the deceased the executor of the deceased stands in the shoes of the deceased." In Beer v. Landman a recovery of the specific notes transferred in a gaming transaction was sought and denied; in this case the transfer is ignored and suit is brought on the policies themselves. Could plaintiff make out a case without proving the illegal transaction? At any rate he has not done so, and clearly he could not do so. The policies were not in plaintiff's possession. He could not take the first step on the trial without producing the policies or accounting for their non-production; in accounting for their non-production he would show that they had been assigned, which would put him out of court until he showed how and why they were assigned, and this would put him out of court also,—through a different door. We could illustrate the utter unsoundness of the reasoning of the Court of Civil Appeals in other ways, but we will not stop, to do so now.

Ninth Assignment of Error.

The Court of Appeals erred in overruling appellant's
92 fourth assignment of error, reading as follows:

"The court erred in rendering judgment for plaintiff for statutory damages and for attorney's fees, because there is no evidence that the insurance company failed to pay the policies within the time specified in the policies after demand made therefor, within the true spirit and proper construction of the statute, and the evidence shows that there was no such failure or refusal to pay as is contemplated by the statute."

Tenth Assignment of Error.

The Court of Civil Appeals erred in overruling appellant's fifth assignment of error, reading as follows:

"The court erred in rendering judgment for the plaintiff for statutory damages and for attorney's fees, because the Texas stat-

ute, Revised Statutes Art. 3071, as construed in this case, is in conflict with and in violation of Section 1, Art. 14, of the Amendments of the Constitution of the United States."

Argument.

Under the ninth and tenth assignments we submit that the statute does not apply to a case of this character, and that if it is held to apply to such a case to that extent, it is unconstitutional. We are, of course, aware that as applied to a very different state of facts, the constitutionality of the statute has been sustained, but a statute, construed one way, may be constitutional, and construed another way may be unconstitutional. The statute applies only when an insurance company "refuses" to pay. In this case there was no such refusal. The company admitted liability and did everything in its power to pay and get a discharge. It was not a debtor refusing to pay. It was an absolutely innocent stakeholder. Under familiar principles in equity, if it could have got jurisdiction of the rival claimants in one court it could have filed a bill of interpleader, and would have been awarded its costs and counsel fees. Because
93 it could not do so, through no fault of its own, but through the obstinacy of Cohen and Hilsman, it, the only party to the transaction that unquestionably is completely innocent, is now taxed with costs, interest, damages and attorney's fees. We submit that this is not in accordance with either the letter or the spirit of the statute.

Eleventh Assignment of Error.

The Court of Civil Appeals erred in not sustaining appellant's seventh assignment of error, reading as follows:

"The court erred in failing and refusing to allow credit for the $460.00 paid by J. H. Hilsman to the insured, and interest thereon from date of such payment, and the judgment of the Court is excessive."

REMARKS.—In support of this assignment see authorities cited and quoted in our original brief, pages 20-24.

Because of the errors thus assigned, petitioner prays that it be granted a writ of error to review said judgment of said Court of Civil Appeals, and that on hearing, the judgment of said court and that of the District Court be reversed.

Respectfully submitted.

W. J. MORONEY,
Attorney for Manhattan Life Insurance Company of New York, Dallas, Texas.

(Endorsed: App. No. 7395. No. 4659. Manhattan Life Insurance Company, Appellant, vs. David Cohen, Executor, Appellee. Petition of Manhattan Life Insurance Company to Supreme Court for writ of Error. Filed in Court of Civil Appeals at San Antonio, Texas, Jul. 20, 1911. Jos. Murray, Clerk. Filed in Supreme Court

July 31, 1911. F. T. Connerly, Clerk, by J. S. Myrick, Deputy. Refused. W. J. Moroney, attorney, Dallas, Texas.)

94 OCTOBER 11, 1911.

App. No. 7395.

MANHATTAN LIFE INSURANCE CO.
vs.
DAVID COHEN, Ex't'r.

From Harris County, Fourth District.

This day came on to be heard the application of Manhattan Life Insurance Co., for writ of error to the Court of Civil Appeals for the Fourth District, and the same having been duly considered, it is ordered that said application be refused; That the applicant Manhattan Life Insurance Company and its surety The United States Fidelity & Guaranty Company, pay all costs incurred on this application.

In the Supreme Court of Texas.

MANHATTAN LIFE INSURANCE COMPANY.
v.
DAVID COHEN, Executor.

Motion for Rehearing by Manhattan Life Insurance Company on Petition for Writ of Error to Court of Civil Appeals, Fourth District.

To the Honorable Supreme Court of the State of Texas:

Your petitioner, the Manhattan Life Insurance Company of New York, respectfully prays that it be granted a rehearing of the above mentioned petition for writ of error, which petition has heretofore been denied.

We make our original petition a part of this motion, and in other respects, we will proceed informally and as briefly as practicable.

95 We are firmly convinced that the decision in this case is both inequitable and contrary to the rules of law that have heretofore been considered firmly established. We will not now undertake to review the entire case, but will briefly allude to the following matters:

1. The holding that the assignment of the policies was absolutely void is in direct conflict with the decisions of this court in Schofield v. Turner, 75 Tex. 324, Cheeves v. Anders, 87 Tex. 287 and Pacific Mutual Life Insurance Company v. Williams, 79 Tex. 633, where it was directly ruled that the transfer of a life insurance policy to one who have no insurable interest transferred the legal title, with authority to collect, the purchaser holding the proceeds as trustee for those who were beneficially interested.

2. The holding that the purchaser of a policy for a valuable consideration acquires no rights is in direct conflict with the authorities

above cited, and all the authorities on the subject, except the decision in this case. All other cases hold that the purchaser acquires the legal title, with an equitable interest at least to the extent of all monies advanced by him, and interest thereon. The practice of hypothecating policies has become universal and even courts that limit the power of absolute sale have always treated such attempted sales as valid pledges. It seems to us that the cases cited by us in our printed brief, pages 20-23, place this matter beyond dispute. This has heretofore not only been held to be the law, but the entire business world has treated it as unquestioned law, and life insurance policies have heretofore been considered as unquestionably valid collateral. To hold otherwise would deprive such policies of much of their value to business men, many of whom are compelled to borrow money on their policies. In fact loans on policies constitute the rule rather than the exception in times of financial stress. Every life insurance makes loans on its own policies, and the Insurance Company in this very case, made loans on the identical poli-
96 cies in suit, and the validity of these loans is not questioned.

There is no law or reason for holding that a policy holder is confined to the Insurance Company in applying for accommodation, and there is no sound reason for holding that an attempted sale shall not be sustained at least to the extent of holding it a valid pledge for the consideration advanced and legal interest thereon. This, so far as we are advised, is a universal rule of equity. It is applied when a deed, absolute on its face, is held to be a mortgage, and even in cases of actual fraud the rule applies that he who asks equity must do equity.

3. The holding that one who transfers security in a gambling transaction can ignore such transfer, and recover the securities, or recover on them, is in direct conflict with the decision of this court in Beer v. Landman, 88 Tex. 450. The rule in such cases is that the law leaves parties where it finds them, and in this case the law found Cohen without the policies or their proceeds.

4. We believe that all the assignments in our petition for writ of error should be sustained, and we again urge them on the consideration of this court; but we will now merely repeat what we originally said. We will merely call special attention to a few of the plainest points in the case.

We are in a position to state that the decision in this case has astonished such of the legal profession, in and out of Texas, as have noticed it, and while this fact does not necessarily prove that the decision is unsound, it is sufficient to suggest the advisability of a careful review of the grounds for the opinion which departs in various ways from what has been understood to be the settled law.

Respectfully submitted,

W. J. MORONEY,

Attorney for Manhattan Life Ins. Co., Dallas, Texas.

97 (Endorsed:) Mo. No. 2591. No. —. Manhattan Life Ins. Co. v. David Cohen, Executor. Motion for rehearing, by Manhattan Life Insurance Company, for Writ of Error to Court

of Civil Appeals, Fourth District. Filed in Supreme Court Oct. 23rd, 1911. F. T. Connerly, Clerk, by J. S. Myrick, Deputy. Overruled.

Order Overruling Motion for Rehearing.

Mo. No. 2591.

NOVEMBER 8, 1911.

MANHATTAN LIFE INSURANCE CO.
vs.
DAVID COHEN, Extr.

From Harris County—Fourth District.

For rehearing of App. No. 7395.

Motion overruled.

CLERK'S OFFICE—SUPREME COURT.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing twelve pages contain a true and correct copy of the original petition for writ of error; the order overruling the petition for writ of error, the original motion for rehearing and the order overruling the motion for rehearing, and all endorsements thereon, in App. No. 7395, Manhattan Life Insurance Company vs. David Cohen, Extr., now on file and of record in this office.

Witness My Hand and the seal of said court at the City of Austin, this the 13th day of December, A. D., 1911.

[SEAL.] F. T. CONNERLY, *Clerk.*
By J. F. MYRICK, *Deputy.*

(Endorsed:) App. 7395. Manhattan Life Ins. Co. vs. David Cohen, Extr., Certified Copy of Petition for Writ of Error, &c. Filed in the Court of Civil Appeals, at San Antonio, Texas, Dec. 19, 1911. Jos. Murray, Clerk.

98 *Judgment in Supreme Court.*

In Supreme Court of Texas.

From Harris County, 4th District.

MANHATTAN LIFE INS. CO.,
vs.
DAVID COHEN, Extr.

OCTOBER 11th, 1911.

This day came on to be heard the application of Manhattan Life Ins. Co. for a writ of error to the Court of Civil Appeals for the Fourth District, and the same having been duly considered,

it is ordered that said application be refused. That the applicant Manhattan Life Insurance Company and its surety The United States Fidelity and Guaranty Company pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said Court this the 10th day of November, A. D., 1911.

[SEAL.] F. T. CONNERLY, *Clerk*.
By J. F. MYRICK, *Deputy*.

Motion for rehearing overruled Nov. 8th, 1911.

(Endorsed:) Application No. 7395. Manhattan Life Ins. Co., vs. David Cohen, Extr. Copy of Judgment in Supreme Court. Application for Writ of Error Refused. Filed in the Court of Civil Appeals, at San Antonio, Texas, Nov. 11, 1911. Jos. Murray, Clerk.

99 *Petition for Writ of Error from Supreme Court of United States.*

(Filed Dec. 11th, A. D. 1911.)

In the Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

No. 4659.

MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK,
vs.
DAVID COHEN, Independent Executor of the Estate of Jacob Cohen, Deceased.

To any Justice of the Supreme Court of the United States, or the Chief Justice of the Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas:

Your petitioner, the Manhattan Life Insurance Company of New York (hereinafter styled Insurance Company) a private corporation incorporated under the laws of the State of New York, and the United States Fidelity and Guaranty Company, (hereinafter styled Guaranty Company) a private corporation organized under the laws of the State of Maryland, complaining of David Cohen, Independent Executor of the Estate of Jacob Cohen, deceased, respectfully represent that on or about the 15th day of May, 1908, said David Cohen, Executor, commenced a suit in the 11th Judicial District Court of Harris County, Texas, against said Insurance Company to recover the amount claimed to be due as principal and interest on two life insurance policies for $3,750.00 each, issued by the Insurance Company on the life of Jacob Cohen, and also to recover statutory damages and attorneys' fees, all as particularly stated in plaintiff's pe-

tition in said suit. Afterwards, in response to process served upon it, said Insurance Company appeared and answered in said suit and interposed among others the defenses hereinafter mentioned,
100 and upon trial of said suit in due course judgment was rendered by said District Court on or about June 30, 1910, in favor of plaintiff against defendant for to-wit: $5,750.00 and 6% interest per annum from June 10, 1908, total $6,459.17 and $690.00 statutory damages, and $700.00 statutory attorney's fees, with 6% per annum interest on said items from date of judgment, and all costs of suit, all as more particularly set forth in said judgment.

From the judgment so rendered by said District Court said Insurance Company appealed to the Court of Civil Appeals, First Supreme Judicial District of Texas, and filed a supersedeas appeal bond with said Guaranty Company as surety, and in due course caused the record to be filed in said Court of Civil Appeals as provided by law. Thereafter, by order of the Supreme Court of Texas, said cause was duly transferred to the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, where the record was filed, and numbered and entitled as above; and, afterwards, on to-wit the 31st day of May, 1911, said Court of Civil Appeals, Fourth Supreme Judicial District of Texas, rendered judgment in all respects affirming the judgment of said District Court, and also rendered judgment against said Guaranty Company as surety on said supersedeas appeal bond, for the amount of said judgment, interest and costs. Afterwards, and in due course, said Insurance Company filed in said Court of Civil Appeals, Fourth Supreme Judicial District of Texas, its motion for rehearing in said cause, which motion was thereafter, on to-wit the 21st day of June, 1911, overruled and denied. Thereafter in due course of time, said Insurance Company applied in due form and as provided by law to the Supreme Court of the State of Texas for a writ of error in said cause, to said Court of Civil Appeals, Fourth Supreme Judicial District of Texas, upon the grounds, among others, hereinafter mentioned, which application was thereafter, to-wit, on the 4th day of October, 1911, by said Supreme Court
101 denied, and the writ of error so prayed for refused. Thereafter, in due time, said Insurance Company filed in said Supreme Court its motion for rehearing on said petition for writ of error, which motion was thereafter on the 8th day of November, 1911, overruled and denied, and the record in said cause was thereupon remitted to said Court of Civil Appeals, Fourth Supreme Judicial District of Texas; whereupon the said judgment of said Court of Civil Appeals, which is the highest court in the State of Texas in which a decision in said suit could be had, became and is now final.

Petitioners say that they are aggrieved by the said judgment of the said Court of Civil Appeals, and the proceedings in said suit, and that in the said judgment and proceedings had prior thereto in said cause, errors were committed to the prejudice of petitioners, because there was drawn in question the validity of a statute and an authority exercised under the United States, and the decision in said suit was against their validity; and there was drawn in question the validity of a statute, or constitution of, or an authority exercised

under, a state on the ground of their being repugnant to the Constitution or laws of the United States, and the decision in said suit was in favor of their validity, and that titles, rights, privileges and immunities were in said suit claimed by petitioners under the Constitution and Statutes of and commissions held and authority exercised under the United States and the decision in said suit was against the titles, rights, privileges and immunities specially set up and claimed therein by the petitioners under such Constitution, statutes, commission and authority.

Petitioners say that various Federal questions arose on the record in said cause, and were decided adversely to petitioners; that each and all of said rulings were duly assigned as error in and were urged as grounds for reversal in said Court of Civil Appeals, and as grounds for said application to said Supreme Court of Texas for a writ of error in said cause to said Court of Civil Appeals,
102 and as grounds for relief in said motions for rehearing in the Court of Civil Appeals and Supreme Court, but the same were overruled and denied by said Court of Civil Appeals and the Supreme Court.

Petitioners refer to the record of said cause, as filed in said Court of Civil Appeals, for further and more complete statement of the rulings and proceedings complained of, and the facts upon which they specifically claimed the benefit of the Federal rights they specifically set up, and the manner in which such claims were set up and claimed. And petitioners say that in the proceedings above mentioned in said cause they specifically set up and claimed titles, rights, privileges and immunities under the Constitution and Statutes of, and commission held, and authorities exercised under, the United States, and the decision of said District Court, and of said Court of Civil Appeals, and of said Supreme Court of Texas, were against the titles, rights, privileges and immunities specially set up and claimed by the petitioners in said cause.

Petitioners refer to the assignments of errors filed herewith, and pray that the same may be considered for the purposes of this application as a part hereof, and further pray that a writ of error may be allowed and issued herein to the said Court of Civil Appeals, Fourth Supreme Judicial District of Texas, which now has the record in said cause, for the removal of said cause unto the Supreme Court of the United States, to the end that the errors in said judgment, and the proceedings in said cause may be duly corrected and full and speedy justice done to petitioners aforesaid in this behalf, and that the transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to the said Supreme Court of the United States.

Petitioners further allege that a mandate on said judgment of said Court of Civil Appeals has been issued and filed with
103 said District Court; that petitioners desire to supersede and suspend the execution of said judgment pending the final disposition of the writ of error herein applied for, and petitioners, in order to obtain such supersedeas, herewith offer to make such bond as may be required under the law, and to comply with all other

terms and conditions that may be properly required in order to obtain such supersedeas. Petitioners allege that said plaintiff threatens to have execution issued immediately on said judgment, and levied on the property of petitioners, and to have such property sold in due course; petitioners therefore further pray that upon the allowance of the writ of error herein applied for, and the approval and filing of proper supersedeas bond, a writ of supersedeas or other appropriate process or order, be issued and directed to said District Court, and the judge and officers of said court, and all officers acting under the process or authority of said court, commanding them, and each of them to refrain from taking any steps to collect said judgment by process of law, and to suspend the issuance of execution, and all such proceedings under any execution that may have issued, until the final disposition by the Supreme Court of the United States of the writ of error herein applied for, and that all further proceedings in said cause be subject to the orders and decrees of said Supreme Court of the United States.

W. J. MORONEY,

Attorney for Petitioners the Manhattan Life Insurance Company of New York and the United States Fidelity and Guaranty Company.

Allowed, this 11th day of December, A. D. 1911, the writ of error to operate as a supersedeas.

JOHN H. JAMES,

Chief Justice of the Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas.

104 (Endorsed:) No. 4659. Manhattan Life Insurance Company, of New York, v. David Cohen, Independent Executor of the Estate of Jacob Cohen, Deceased. In Court of Civil Appeals, Fourth Supreme Judicial District of Texas. Petition for Writ of Error from Supreme Court of United States. Filed in the Court of Civil Appeals, at San Antonio, Texas, Dec. 11, 1911. Jos. Murray, Clerk.

Bond on Writ of Error from Supreme Court of the United States.

(Filed Dec. 11th, A. D. 1911.)

In the Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

No. 4659.

MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK
vs.
DAVID COHEN, Independent Executor of the Estate of Jacob Cohen, Deceased.

Bond on Writ of Error from the Supreme Court of the United States.

Know all men by these presents: That we, Manhattan Life Insurance Company of New York and the United States Fidelity & Guaranty Company, as principals, and the Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto David Cohen, Independent Executor of the Estate of Jacob Cohen, deceased, in the sum of Twelve Thousand Dollars ($12,000.00) to be paid
105 to the said obligee, his heirs, executors, representatives and assigns, to the payment of which, well and truly to be made, we bind ourselves, our heirs, representatives and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 11th day of December, 1911.

Whereas the above named plaintiffs in error have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their said writ of error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK,
By W. J. MORONEY, *Attorney.*
UNITED STATES FIDELITY & GUARANTY COMPANY,
By W. J. MORONEY, *Attorney.*
FIDELITY & DEPOSIT COMPANY OF MD.,
By J. L. BURGESS, *Att'y in Fact.*

Attest:
[SEAL.] M. MURPHY, *Agent.*

I hereby approve the foregoing bond and sureties, said bond to operate as a supersedeas, this 11th day of December, A. D. 1911.

JOHN H. JAMES,
Chief Justice of the Court of Civil Appeals,
Fourth Supreme Judicial District of Texas.

106 (Endorsed:) No. 4659. Manhattan Life Insurance Company of New York, v. David Cohen, Independent Executor of the Estate of Jacob Cohen, Deceased. In Court of Civil Appeals, Fourth Supreme Judicial District of Texas. Bond on Writ of Error, from Supreme Court of the United States. Filed in the Court of Civil Appeals, at San Antonio, Texas, Dec. 11, 1911. Jos. Murray, Clerk.

Writ of Error from the Supreme Court of the United States.

(Filed Dec. 11, 1911.)

THE UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the Honorable the Judges of the Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between David Cohen, independent executor of the Estate of Jacob Cohen, deceased, as plaintiff, and appellee; and the Manhattan Life Insurance Company of New York, as defendant, and appellant, and the United States Fidelity & Guaranty Company, surety for said Manhattan Life Insurance Company of New York, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a
107 statute of, and authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of said Manhattan Life Insurance Company of New York and the United States Fidelity and Guaranty Company, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the said Supreme Court of the United States, the 11th day of December, in the year of our Lord one thousand, nine hundred and eleven.

D. H. HART,
Clerk Circuit Court, Western District of Texas.
By A. I. CAMPBELL, *Deputy.*

Allowed:
JOHN H. JAMES,
Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

108 (Endorsed:) No. 4650. Manhattan Life Insurance Company of New York v. David Cohen, Independent Executor of the Estate of Jacob Cohen, deceased. In Court of Civil Appeals, Fourth Supreme Judicial District of Texas. Writ of Error from the Supreme Court of the United States. Filed in the Court of Civil Appeals at San Antonio, Texas, Dec. 11, 1911. Jos. Murray, Clerk.

Citation in Error on Writ of Error from Supreme Court of the United States.

Filed Dec. 26th A. D. 1911

THE UNITED STATES OF AMERICA, *ss:*

To David Cohen, Independent Executor of the Estate of Jacob Cohen, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas, wherein the Manhattan Life Insurance Company of New York and the United States Fidelity and Guaranty Company are plaintiffs in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Jus-
109 tice of the Supreme Court of the United States, this 11th day of December, one thousand nine hundred and eleven.

JOHN H. JAMES,
Chief Justice of the Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas.

We hereby accept service of above and foregoing citation in error and waive further service thereof. This — day of December, A. D. 1911.

———,
Attorneys for Defendant in Error.

I hereby authorize and deputize the United States Marshal for the Southern District of Texas, or any of his deputies, to serve the above citation in error.

JOHN H. JAMES,
Chief Justice of the Court of Civil Appeals,
Fourth Supreme Judicial District of Texas.

(Endorsed:) Came to hand the 13th day of December, 1911, and executed same day by delivering to David Cohen, defendant in error and to W. S. Hunt a member of the firm of Hunt, Myer & Teable attorneys for said defendant in error, each in person a certified copy of the within citation in error.

C. G. BREWSTER,
United States Marshal, Southern District of Texas.
By L. A. McFARLANE, *Deputy.*

Manhattan Life Insurance Company of New York v. David Cohen, Independent Executor of the Estate of Jacob Cohen, dec'd. In Court of Civil Appeals, Fourth Sup. Jud. Dist. of Texas. Citation in Error on Writ of Error from Supreme Court of the United States. Filed in the Court of Civil Appeals, at San Antonio, Texas Dec. 26, 1911. Jos. Murray, Clerk. Received 12/13/11. Marshal's Docket No. 787.

110 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between David Cohen, independent executor of the Estate of Jacob Cohen, deceased, as plaintiff, and appellee, and the Manhattan Life Insurance Company of New York, as defendant, and appellant, and the United States Fidelity & Guaranty Company, surety for said Manhattan Life Insurance Company of New York, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of said Manhattan Life

Insurance Company of New York and the United States Fidelity and Guaranty Company, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

111 Witness, the Honorable Edward Douglass White, Chief Justice of the said Supreme Court of the United States, the 11th day of December, in the year of our Lord one thousand, nine hundred and eleven.

[The Seal of the U. S. Circuit Court, Western Dist. Texas.]

D. H. HART,
Clerk Circuit Court, Western District of Texas.
By A. I. CAMPBELL,
Deputy.

Allowed:

JOHN H. JAMES,
Supreme Judicial District of Texas.
Chief Justice of the Court of Civil Appeals for the Fourth

THE STATE OF TEXAS,
Court Civil Appeals:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case with all things concerning same.

In witness whereof, I hereunto subscribe my name, and affix the seal of the Court of Civil Appeals Fourth Dist. of Texas, in the City of San Antonio this Dece. 28th 1911.

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY,
Clerk Court Civil Appeals, Fourth Sup. Jud. Dist. of Texas.

111½ [Endorsed:] No. 4659. Manhattan Life Insurance Company of New York, v. David Cohen, Independent Executor of the Estate of Jacob Cohen, deceased. In Court of Civil Appeals Fourth Supreme Judicial District of Texas. Writ of Error from the Supreme Court of the United States. Filed in the Court of Civil Appeals, at San Antonio, Texas, Dec. 11, 1911. Jos. Murray, Clerk.

112 THE UNITED STATES OF AMERICA, *ss:*

To David Cohen, Independent Executor of the Estate of Jacob Cohen, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas, wherein the Manhattan Life Insurance Company of New York and the United States Fidelity and Guaranty Company are plaintiffs in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 11th day of December, one thousand nine hundred and eleven.

JOHN H. JAMES,
Chief Justice of the Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas.

We hereby accept service of above and foregoing citation in error and waive further service thereof. This — day of December, A. D. 1911.

——— ———,
Attorneys for Defendant in Error.

I hereby authorize and deputize the United States Marshal for the Southern District of Texas, or any of his deputies, to serve the above citation in error.

JOHN H. JAMES,
Chief Justice of the Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

112½ Came to hand the 13th day of December 1911 and executed same day by delivering to David Cohen, defendant in error and to W. S. Hunt a member of the firm of Hunt Myer & Teagle attorneys for said defendant in error, each in person a certified copy of the within citation in error.

C. G. BREWSTER,
United States Marshal, Southern District of Texas.
By L. N. McFARLANE, *Deputy.*

(Endorsed:) Original. No. —. Manhattan Life Insurance Company of New York, v. David Cohen, Independent Executor of the Estate of Jacob Cohen, dec'd. In Court of Civil Appeals, Fourth Supreme Judicial District of Texas. Citation in Error on Writ of Error from Supreme Court of the United States. Filed in the Court of Civil Appeals, at San Antonio, Texas, Dec. 26, 1911. Jos. Murray, Clerk.

113 *Certificate of Lodgment.*

I, Jos. Murray, Clerk Court Civil Appeals, in and for Fourth Supreme Judicial District of Texas, do hereby certify that there was lodged with me as such clerk on December 11th, 1911, in the matter of The Manhattan Life Insurance Company of New York, Appellant, versus David Cohen, Independent Executor of the Estate of Jacob Cohen, Dec'd, appellee,

1st. The original bond of which a copy is herein set forth.

2nd. Two copies of the writ of error as herein set forth—one for the defendant and one to file in my office.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court at my office in San Antonio, Texas, this December 28th, 1911.

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY,
Clerk Court Civil Appeals in and for Fourth Supreme Judicial District of Texas.

114 *Assignment of Errors.*

(Filed Dec. 11th, 1911.)

In the Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

No. 4658.

MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK
vs.
DAVID COHEN, Independent Executor of the Estate of Jacob Cohen, Deceased.

Now comes the Manhattan Life Insurance Company of New York, appellant in the above numbered and entitled cause, and the United States Fidelity & Guaranty Company, surety on said appellant's appeal bond, and on writ of error from the Supreme Court of the United States say that in the record and proceedings in said cause there are manifest errors to their prejudice which they assign as follows:

First.

The Court of Civil Appeals erred in overruling and refusing to sustain the original assignment of error number one of said appellant Insurance Company to the effect that the court erred in rendering judgment for the plaintiff for any amount, because the evidence shows conclusively that the defendant Insurance Company had paid the full amount due on the life insurance policies to J. H. Hilsman who in any view of the law or facts had at least sufficient interest in

said policies to authorize him to collect the same, and the payment to Hilsman discharged the Insurance Company from liability, and any claim that plaintiff may have is against Hilsman, and not against the Insurance Company.

Said ruling deprived appellant Insurance Company of rights, privileges and property without due process of law, and de-
115 nied appellant the equal protection of the laws, and unlawfully abridged privileges and immunities of citizens of the United States to discharge contracts which were valid when and where they were made, in violation of Section 1, Article 14, of the Amendments to the Constitution of the United States, and said ruling was also in violation of Section 10, Article 1 of the Constitution of the United States prohibiting the enforcement of laws impairing the obligations of contracts.

Second.

The Court of Civil Appeals erred in overruling and refusing to sustain the original assignment of error number two of said appellant Insurance Company, to the effect that the court erred in rendering judgment for plaintiff for any amount, because the evidence shows conclusively that the insurance policies were transferred to J. H. Hilsman by valid transfers delivered and consummated in the State of Georgia; that under the laws of Georgia such transfers were valid contracts and that plaintiff has no interest in said policies.

Said ruling deprived appellant Insurance Company of rights, privileges and property without due process of law, and denied appellant the equal protection of the laws, and unlawfully abridged privileges and immunities of citizens of the United States to make contracts which are valid when and where they are made, in violation of Section 1, Article 14, of the Amendments to the Constitution of the United States, and said ruling was also in violation of Section 10, Article 1, of the Constitution of the United States prohibiting the enforcement of laws impairing the obligation of contracts.

Third.

The Court of Civil Appeals erred in overruling and refus-
116 ing to sustain the original assignment of error number five of appellant Manhattan Life Insurance Company of New York to the effect that the court erred in rendering judgment for plaintiff for statutory damages and for attorneys' fees, because the Texas Statute, Revised Statutes, Article 3071, as construed in this case, is in conflict with and in violation of Section 1, Article 14, of the Amendments to the Constitution of the United States, providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

Fourth.

The Court of Civil Appeals erred in overruling and refusing to sustain the original assignment of error number seven of appellant Insurance Company to the effect that the court erred in failing and refusing to allow credit for the $460.00 paid by J. H. Hilsman to the insured, and interest thereon from date of such payment, and the judgment of the court is excessive.

Said ruling deprived appellant Insurance Company of rights, privileges and property, without due process of law, and denied appellant the equal protection of the laws, and unlawfully abridged privileges and immunities of citizens of the United States, in violation of Section 1, Article 14, of the Amendments to the Constitution of the United States.

Fifth.

The Court of Civil Appeals erred in deciding against the titles, rights, privileges and immunities specially set up and claimed by said Insurance Company under the Constitution and Statutes of the United States.

Sixth.

The Court of Civil Appeals erred in affirming the judg-
117 ment of the District Court, because plaintiff alleged and proved no valid cause of action against said Insurance Company.

Wherefore plaintiffs in error each pray that the judgment of said Court of Civil Appeals be reversed, and for such further proceedings as law and justice may require.

W. J. MORONEY,
Attorney for the Manhattan Life Insurance Company of New York and the United States Fidelity and Guaranty Company, Plaintiffs in Error.

(Endorsed:) No. 4659. Manhattan Life Insurance Company of New York, Appellant, v. David Cohen, Independent Executor of the Estate of Jacob Cohen, deceased, Appellee. Assignment of errors by the Manhattan Life Insurance Company of New York and the United States Fidelity & Guaranty Company, on writ of error from the Supreme Court of the United States. Filed in the Court of Civil Appeals, at San Antonio, Texas, Dec. 11, 1911. Jos. Murray, Clerk.

118 *Cost Bill.*

In Court of Civil Appeals, San Antonio, Texas.

No. 4659.

MANHATTAN LIFE INS. CO., Appellant,
vs.
DAVID L. COHEN, Ex't'r, Appellee.

From Harris County.

Record Filed Aug. 6th, 1910.
How Decided,—Affirmed.
Disposed of June 21, 1911.

Opinion by Neill, A. J.

Filing Record	$.50
Docketing Cause	.50
Appearances	1.00
Filing Briefs and other Papers	2.90
Notices	3.00
Orders	2.00
Judgment	1.00
Recording Opinion	15.75
Certificate with Seal	.50
Taxing Cost	.50
Certified Copy Bill of Costs	1.00
Mandate	1.50
Filing and Docketing Motion	.35
Precept	1.00
Making Certified Copy of Motion	3.20
Sheriff's Fees	1.00
Transcript to Supreme Court United States	59.50
Certificate of Lodgment and return to writ	1.00
Costs in Court of Civil Appeals at Galveston	5.85
Transcript to Supreme Court	1.50
Costs in Supreme Court	8.05
Total	$111.60
By Cash	50.50
To balance	$61.10

THE STATE OF TEXAS:

I, Jos. Murray, Clerk of the Court of Civil Appeals of Texas, at San Antonio, hereby certify that the above and foregoing Bill of Costs for the sum of Sixty one & 10/100 Dollars, is true and correct.

Given under my hand and seal of office this 28th day of December, A. D., 1911.

[SEAL.] JOS. MURRAY, *Clerk.*

119 *Authentication of Record.*

I, Jos. Murray, Clerk Court Civil Appeals in and for the Fourth Supreme Judicial District of Texas, do hereby certify that the foregoing is a true, full and complete transcript of the record and all the proceedings in the case of The Manhattan Life Insurance Company of New York, Appellant versus David Cohen, Independent Executor of the Estate of Jacob Cohen, deceased, Appellee, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in San Antonio, Texas this 28th day of December, A. D., 1911.

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY,
Clerk Court Civil Appeals, Fourth Supreme Judicial District of Texas.

Endorsed on cover: File No. 23,001. Texas, 4th Supreme Judicial District, Court of Civil Appeals. Term No. 160. Manhattan Life Insurance Company of New York and United States Fidelity and Guaranty Company, plaintiffs in error, vs. David Cohen, independent executor of the estate of Jacob Cohen, deceased. Filed January 8th, 1912. File No. 23,001.

/c

No. 160

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913

MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK, AND UNITED STATES FIDELITY & GUARANTY COMPANY, *Plaintiffs in Error*,

VS.

DAVID COHEN, INDEPENDENT EXECUTOR OF THE ESTATE OF JACOB COHEN, DECEASED, *Defendant in Error*.

MOTION TO AFFIRM.

—By—

WILMER S. HUNT,

Attorney for Defendant in Error.

GRAY, DILLARD & YOUNG, HOUSTON, TEXAS

In the

Supreme Court of the United States

October Term, 1913.

No. 160.

MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK, AND UNITED STATES FIDELITY & GUARANTY COMPANY, *Plaintiffs in Error*,

vs.

DAVID COHEN, INDEPENDENT EXECUTOR OF THE ESTATE OF JACOB COHEN, DECEASED, *Defendant in Error*.

MOTION TO AFFIRM.

To the Supreme Court of the United States:

Now, in the above styled and numbered cause, comes David Cohen, the defendant in error, and files this, his motion to affirm the judgment rendered by the Court of Civil Appeals of Texas in this cause, for the following reasons, to wit:

FIRST.

This action originated in the Eleventh District Court of Harris County, Texas, a court organized as a State court of Texas. The defendant in said court, the Man

hattan Life Insurance Company of New York, filed its answer, and the pleadings in said cause wholly failed to raise thereby, or to present in any manner, to the trial court, any Federal question of any kind. (See answer of Man hattan Life Insurance Company, pages 5 to 10 of printed record.)

That thereafter, the plaintiff in error filed in said Eleventh District Court its motion for a new trial, and thereby raised for the first time the question of the constitutionality of Article 3071 of the Revised Civil Statutes of Texas, which article provides for the assessment of statutory damages and attorney's fees against insurance companies under certain conditions. (See section 5 motion for new trial, page 20 of printed record.)

And defendant in error respectfully submits that said question has not been properly raised; that said assignment is too general to raise a Federal question, and that the question, if properly raised, is too frivolous for consideration, and that it should, on that account, be overruled.

SECOND.

Defendant in error further shows that this cause was briefed in, and fully presented to, the Honorable Court of Civil Appeals for the Fourth Supreme Judicial District of Texas. That on said appeal, the said insurance company raised but one Federal question, which was raised by and presented under its fifth assignment of error, which is here copied in full, to wit:

> "The court erred in rendering judgment for plaintiff for statutory damages and for attorney's fees, because the Texas statute, Revised Statutes, Article 3071, as construed in this case, is in conflict with

"and in violation of, Section 1, Article 14, of the "Amendments to the Constitution of the United "States."

That in accordance with the practice in the courts of Texas, said insurance company, in due time, filed its motion for a re-hearing, which was, by said Court of Civil Appeals, overruled. That in said motion for re-hearing said insurance company presented the same Federal question and no other, to wit: as to the constitutionality of Article 3071, Revised Civil Statutes of Texas.) See printed record, page 51, section X.)

And defendant in error further shows that said question as to the unconstitutionality of said Article 3071 was fully briefed by counsel on the appeal of said cause, and a number of decisions of the Supreme Court of the United States, as well as of the Supreme Court of Texas, were cited in said brief, copies of which were delivered to Honorable W. J. Moroney, counsel for plaintiff in error, who thereby became familiar with the result of said decisions and the holding of the Supreme Court.

That when this cause was decided by the Court of Civil Appeals said court gave due consideration to said question, and held in favor of the constitutionality of said statute, and cited in its opinion many authorities of the Supreme Court of the United States, which had theretofore passed on the validity of said identical statute, and had held it valid and constitutional.

THIRD.

And defendant in error further shows to the court that after this cause was disposed of in said Court of Civil Appeals, the plaintiff in error filed its petition for a writ of error to the Supreme Court of Texas, and no Federal

question was raised therein or thereby, except the same question as to the validity of said statute, which question was therein raised by the tenth assignment of error, in the following words:

> "The court erred in rendering judgment for the "plaintiff for statutory damages and for attorney's "fees, because the Texas statute, Revised Statutes, "Article 3071, as construed in this case, is in conflict "with, and in violation of, Section 1, Article 14, of the "Amendments to the Constitution of the United "States."

(See page 58 of printed record, tenth assignment.)

That no other Federal question was ever presented to the Supreme Court of Texas by plaintiff in error, nor was any other Federal question involved, and said court did not consider or pass upon any other Federal question.

That, this being the only Federal question properly raised in the case, and it having been many times decided adversely to the contention of plaintiff in error, the defendant in error respectfully submits that this writ of error was sued out frivolously and for delay only, and that defendant in error is entitled to an affirmance of said judgment, and for ten per cent. damages for delay.

Wherefore, it prays that the judgment of the Court of Civil Appeals of Texas be in all things affirmed, and that this Honorable Court enter its decree awarding damages to the defendant in error in the sum of ten per cent. upon the amount involved herein.

William S. Hunt.

Counsel for Defendant in Error.

17

No. 160

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913

MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK, AND UNITED STATES FIDELITY & GUARANTY COMPANY, *Plaintiffs in Error*,

VS.

DAVID COHEN, INDEPENDENT EXECUTOR OF THE ESTATE OF JACOB COHEN, DECEASED, *Defendant in Error*.

In Error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.

BRIEF ON MOTION TO AFFIRM.

—By—

WILMER S. HUNT,
Attorney for Defendant in Error.

STERLING MYER,
C. A. TEAGLE,
Of Counsel.

GRAY, DILLAYE & YOUNG, HOUSTON, TEXAS

In the

Supreme Court of the United States

October Term, 1913.

No. 160.

MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK, AND UNITED STATES FIDELITY & GUARANTY COMPANY, *Plaintiffs in Error*,

vs.

DAVID COHEN, INDEPENDENT EXECUTOR OF THE ESTATE OF JACOB COHEN, DECEASED, *Defendant in Error.*

In Error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.

BRIEF ON MOTION TO AFFIRM.

Statement of the Case.

This was an action by defendant in error, David Cohen, as executor of the estate of Jacob Cohen, deceased, to recover of the Manhattan Life Insurance Company the sum of $5,750.00, balance due on two policies on the life of Jacob Cohen, with six per cent. interest, ten per cent. attorney's fees, and twelve per cent. damages, as statutory penalty. The Insurance Company filed a lengthy answer (pages 5 to 10 of printed record), but did not raise thereby any Federal question. The cause was tried in the Eleventh District Court of Harris County, Texas,

and judgment was rendered for the plaintiff, Dave Cohen, for the full amount he had sued for, including 10 per cent. attorney's fees, and twelve per cent. statutory damages. (Page 17, printed record.) The defendant below filed its motion for a new trial, and then set up the claim that the Texas statutes, Article 3071, which allows attorney's fees and damages, was unconstitutional. (Sec. 5, Motion for New Trial, p. 20, printed record.) The motion was overruled, defendant appealed to the Court of Civil Appeals, and upon hearing in that court the judgment was affirmed. (See opinion, pages 34 to 47, printed record.)

The plaintiff in error then filed a motion for re-hearing in the Court of Civil Appeals, which was overruled, and it then applied for a writ of error to the Supreme Court of Texas (record, pp. 52 to 60), and this petition was refused by said court. (Record, p. 60.)

The plaintiff in error then filed its petition for writ of error to the Supreme Court of the United States, filed a supersedeas bond in the sum of $12,000.00, with the Fidelity & Deposit Company of Baltimore, Maryland, as surety, and in due time filed the same in this court.

The defendant in error filed herein its motion to affirm on the ground that the only Federal question involved had been many times decided by the Supreme Court of the United States, and that therefore the writ of error was sued out frivolously and merely for delay, and therefore the cause should be affirmed with damages, and in support thereof presents the following propositions and authorities:

First Proposition.

When there is a Federal question in the case, but it is so frivolous as to make it manifest that the writ of error

was taken for delay merely, the Supreme Court will affirm on motion.

Statement.

The only question involving the Federal Constitution or statutes was the one raised by motion for new trial, to the effect that Article 3071, Revised Statutes of Texas, was in violation of Section 1, Article 14, of the Amendments to the Constitution of the United States. (Record, p. 20.)

This single question was still raised on appeal, was decided by the Court of Civil Appeals of Texas, which cited decisions of the Supreme Court of the United States upholding the statute (see page 46, printed record), and was then presented to the Texas Supreme Court in the same language, by petition for writ of error. (See page 58, printed record, tenth assignment of error.)

Authorities.

Ruckman v. Bergholtz, 92 U. S., 1876 (23 L. Ed., 1008).
Micas v. Williams, 104 U. S., 570 (26 L. Ed., 842).
Evans v. Brown, 109 U. S., 185 (27 L. Ed., 898).
Boswell v. Hinckley, 180 U. S., 333 (45 L. Ed., 537).

Second Proposition.

The objections to the constitutionality of Article 3071, Revised Statutes of Texas, were frivolous, and merely for delay, as such question had been theretofore passed on by the Supreme Court of the United States, and decided in favor of its validity.

Statement.

The defendant in error briefed the question of the constitutionality of said Article 3071 on the appeal to the

Court of Civil Appeals. The Court of Civil Appeals considered said question and upheld said statute, and cited many decisions both from the State Supreme Court and the Supreme Court of the United States. (See printed record, p. 46.)

Authorities.

Fidelity Mut. L. Assn. v. Mettler, 185 U. S., 150 (46 L. Ed., 922).
Farmers & M. Ins. Co. v. Dabney, 189 U. S., 301.
Iowa L. Ins. Co. v. Lewis, 187 U. S., 335.
Ins. Co. v. Chowning, 86 Tex. Sup. Ct., 654.
Fidelity & C. Co. v. Allibone, 9 Tex., 660.
Penn Mutual Life Ins. Co. v. Maner, 101 Tex., 553.
Ins. Co. v. Jay, 109 S. W., 1117.

Argument.

We respectfully submit that when the plaintiff in error was confronted during this whole contest with the authorities showing the fallacy of its position, it has placed itself in such position that it cannot escape the imputation that it obtained this writ merely for delay. In the authorities above cited, there are references to many other decisions of courts of other States, construing statutes similar to the Texas statute in question, and laying down the same rules and presenting the same arguments as those adopted by this Honorable Court and by the Supreme Court of Texas. Not being left in the dark as to the law on this question, and that being the only one involved which would give this Honorable Court jurisdiction, it must be clear that this writ was sued out on frivolous grounds, and for delay only.

Third Proposition.

When the Federal questions involved in a case are correctly decided by the State Supreme Court, the judgment of that court must be affirmed without determining any other question not of Federal character.

Statement.

The only Federal question passed on was the validity of Art. 3071, Texas Revised Civil Statutes. The Texas courts and the Supreme Court of the United States have heretofore sustained said statute, and the Court of Civil Appeals, in this case, followed said decisions. (See opinino, p. 46 printed record.)

Authorities.

Myrick v. Thompson, 99 U. S., 297 (22 L. Ed., 429).
Murdock v. Memphis, 20 Wall., 590 (25 L. Ed., 324).
Swope v. Leffingwell, 105 U. S., 3 (26 L. Ed., 939).
Gillis v. Stinchfield, 159 U. S., 658 (40 L. Ed., 295).
Seaboard, etc., Co. v. Duvall, 225 U. S., 477 (56 L. Ed., 1171).
Fallbrook Irrigation Dist. v. Bradley, 164 U. S., 112.
Mo. Pac. R'y v. Castle, 224 U. S., 541 (56 L. Ed., 875).

Argument.

Under the above cited authorities the Supreme Court will only consider the Federal question upon which the writ was obtained. If that has been correctly decided by the Supreme Court, no other questions, such as questions of fact or other questions of conflict in the rules of general law as adopted by the Supreme Court, and those adopted by the United States courts in cases originating in the latter courts, will be considered. If the court will limit its consideration only to the Federal question upon which the writ is based, and if, as we contend, the only

Federal question has been correctly decided, then the motion to affirm should be, and ought to be, sustained.

Fourth Proposition.

When a cause has been brought to the Supreme Court on frivolous grounds, or merely for delay, the Supreme Court may affirm with ten per cent. damages for delay.

Statement.

Plaintiff in error, or its counsel, had the benefit of copies of the briefs of defendant in error, in which were cited the authorities of the State Supreme Court and the United States Supreme Court, which had passed on the contention that said statute was unconstitutional. Plaintiff in error was also fully cognizant of the holding of the Court of Civil Appeals in this case, and of the authorities cited in the opinion of said court.

Authorities.

Supreme Court Rule 23.
Revised Statutes, U. S., Sec. 1010.
Gibbs v. Dickinson, 102 U. S., 188 (26 L. Ed., 177).
Kilbourne v. Savings Inst., 22 Howard, 503.
Sutton v. Bancroft, 23 How., 320 (16 L. Ed., 454).
Jennings v. Banning, 23 How., 435 (16 L. Ed., 580).

Fifth Proposition.

The Supreme Court will not consider questions not raised and passed on in the court below, nor will the raising of one Federal question in the State court permit the consideration of other Federal questions than the one raised.

Statement.

At no time in any of the proceedings in the State courts did plaintiff in error raise any Federal question other

than the one pertaining to the attorney's fees and damages of twelve per cent. allowed under the Texas statute. In its petition for writ of error herein it does not set out any particular statute of Texas which is repugnant to the Federal Constitution, nor does its petition point out any certain provision of the Federal Constitution which has been violated by the decision of the State courts herein. (See petition for writ of error, pp. 62 to 66, printed record.)

Authorities.

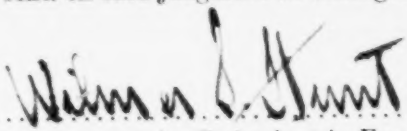
Wilson v. Namie, 102 U. S., 572 (26 L. Ed., 234).
Keokuk & H. B. Co. v. Ill., 175 U. S., 626 (44 L. Ed., 299).
Dewey v. Des Moines, 173 U. S., 193 (43 L. Ed., 665).
Messenger v. Mason, 10 Wall., 507 (19 L. Ed., 1028).
Maxwell v. Newbold, 18 How., 511 (15 L. Ed., 506).
Capitol City Dairy Co. v. Ohio, 183 U. S., 238.

Argument in Conclusion.

We respectfully submit that the questions involved herein are such that they can be easily determined. If there has been raised but one Federal question, and that question has been foreclosed by the decisions of this court, then a motion to affirm is proper, and will be sustained. If the motion to affirm is sustained, and the court can see from the record that the writ was taken out on frivolous grounds, or merely for delay, then the court will award damages for such delay in a sum not exceeding ten per cent. of the amount involved. There can be no question but that this court has heretofore decided the only question involved, and decided it adversely to the contention made by plaintiff in error. There can be no question but that counsel for plaintiff in error was fully aware of the

holding of this court on such question, and therefore must have sued out said writ merely for delay only.

We respectfully ask that the motion to affirm be granted, and that the court allow to defendant in error the sum of ten per cent. on said judgment as damages for delay.



Attorney for Defendant in Error.

STERLING MYER,
C. A. TEAGLE,
Of Counsel.

No. 160.

IN THE

Supreme Court of the United States

October Term, 1913.

MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK,
and
UNITED STATES FIDELITY & GUARANTY COMPANY,
Plaintiffs in Error,

vs.

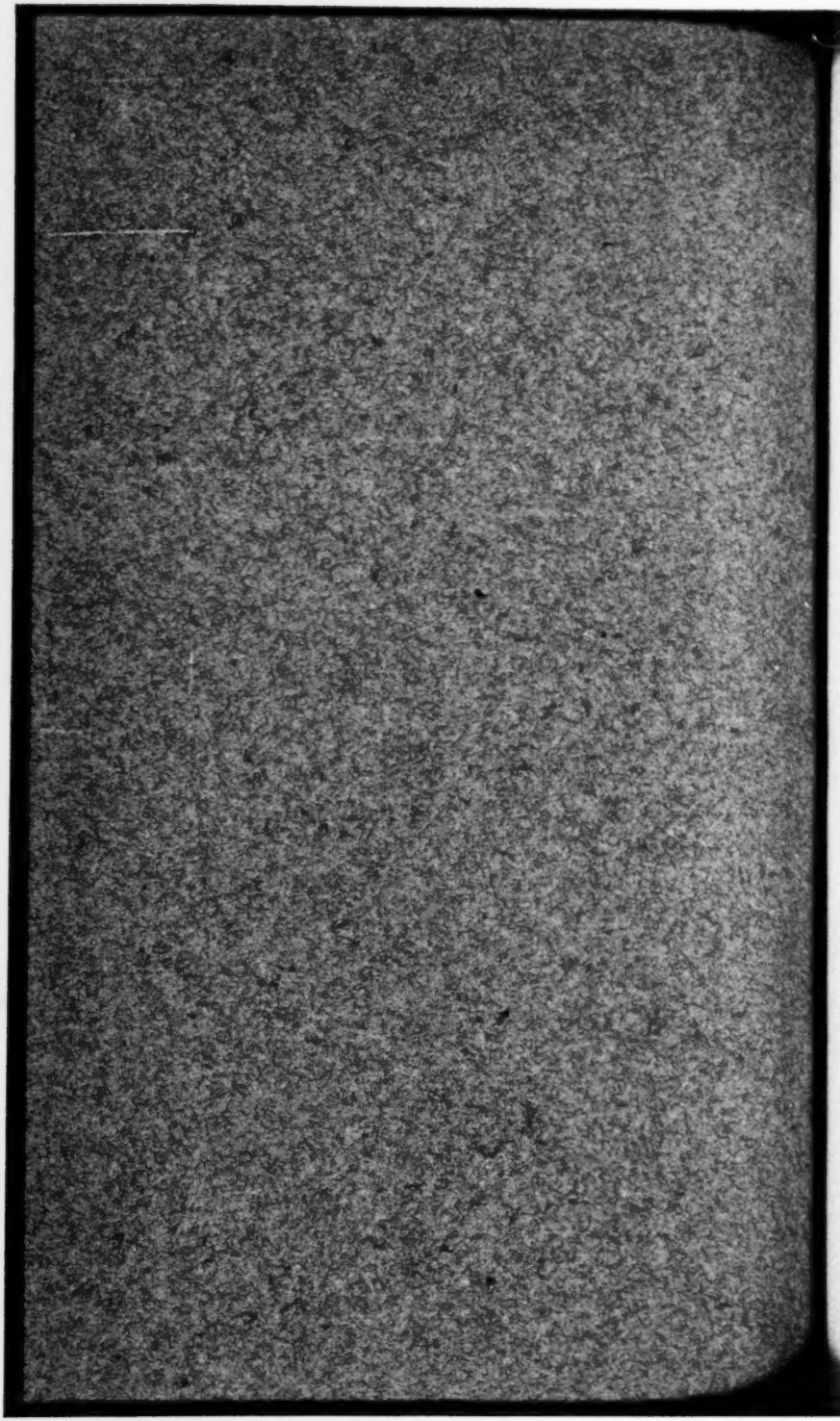
DAVID COHEN, INDEPENDENT EXECUTOR OF THE ESTATE OF JACOB COHEN, DECEASED,
Defendant in Error.

In Error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.

REPLY OF PLAINTIFFS IN ERROR TO THE MOTION TO AFFIRM BY DEFENDANT IN ERROR.

WILLIAM J. MORONEY,
Dallas, Texas,
Attorney for Plaintiffs in Error.

W. M. Warlick, Law P., 819½ Main St., Dallas. Phone M. 4091.



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WILLIAM J. MORONEY,
Dallas, Texas,
Attorney for Plaintiffs in Error.

In this case defendant in error has filed a motion to affirm, on the alleged ground that the record presents no real and substantial Federal question; it being claimed that the only Federal question presented by the record has been foreclosed by previous decisions of this court.

We will first observe that we find in the rules no warrant for this motion, in that it is not united with a motion to dismiss the writ of error, and no such motion to dismiss has been filed. However, as we do not know what view the court may take of this suggestion, and as the motion to affirm raises an issue which must be met sooner or later, we will now reply to said motion. We will say, however, that the writer, not expecting this matter to arise now, has made other engagements that will prevent him from now giving the question raised by the motion satisfactory attention. We will also observe, for reasons that will become apparent as we proceed, that in order properly to consider the question of jurisdiction it will be necessary, at least to a considerable extent, to enter into the merits of the case. For these reasons we respectfully suggest that the motion to affirm should either be dismissed, because not warranted by the rules, or that it should be passed until the hearing on the merits.

We will also say that perhaps it may be properly held of some of the questions in this case, either that they are not Federal questions, or that they were not so raised in the State courts as to confer jurisdiction on this court. However, at least one Federal question was properly raised and decided against plaintiffs in error, and, for reasons that will hereafter appear, it will be necessary to look to the other questions in the case in order to determine whether or not this Federal question has been foreclosed by previous decisions of this court.

The facts shown by the record which we believe bring the present case clearly within the principle of the recent case of St. Louis, etc. Ry Co. v. Wynne, 224 U. S. 354, and the facts which distinguish the present case from previous decisions of this court cited by defendant in error, are not stated in the motion to affirm, or in the brief filed in support of said motion. We therefore make the following statement, the facts being undisputed:

On April 7, 1893, the Manhattan Life Insurance Company of New York issued to Jacob Cohen, of Galveston County, Texas, two policies of insurance on his life for $3,750 each, payable, in

case of his death, and subject to various provisions therein stated, to his executors, administrators or *assigns.* (Printed Record, page 25).

On July 15, 1907, Cohen borrowed $875 on each of said policies from the Insurance Company, pledging the policies as security (P. R. p. 26).

Immediately thereafter Cohen sold and transferred his equity in said policies, subject to said pledges, to J. H. Hilsman, of Atlanta, Georgia, for $460. The transaction was closed by Cohen, in San Antonio, Texas, making a bank draft on Hilsman, in Atlanta, Georgia, for $460, with written assignments of the policies attached to the draft, which assignments were delivered to Hilsman, in Atlanta, Georgia, on his payment of said draft on July 19, 1907 (P. R. pp. 26-28).

Hilsman was not related to Cohen, nor did Hilsman have any interest in the life of Cohen other than through this transaction (P. R. p. 28). But it was pleaded and proved on the trial of this case that under the laws of Georgia, where the assignments of the policies were delivered, such assignments were in all respects valid, notwithstanding the fact that Hilsman had no insurable interest in Cohen's life except by the purchase of said policies (P. R. pp. 30-32).

On October 16, 1907, Jacob Cohen died in Harris County, Texas (P. R. p. 25). The proceeds of said policies, subject to said $875 loans, were claimed both by David Cohen, defendant in error, Jacob Cohen's executor, who lived in Texas, and by Hilsman, the assignee of said policies, who lived in Georgia. Hilsman claimed as assignee of said policies, and Cohen, executor, claimed that the assignments to Hilsman were contrary to public policy and void.

The Insurance Company admitted liability for the face of said policies, less the amount of said loans of $875 each which it had made, and offered to pay the same to the joint order of the rival claimants, or to pay the money into court if the claimants would appear and interplead in a court of competent jurisdiction where

any judgment that might be rendered would fully protect the Insurance Company from double liability. The rival claimants did not accept this proposition (P. R. p. 28).

In a previous case it had been held by the Supreme Court of Texas that, in a bill of interpleader brought by a life insurance company against rival claimants, substituted service on one of such claimants beyond the limits of the State where the suit was brought, was not sufficient to bind the claimant thus served, on the ground that the suit was *in personam*, and not *in rem* (Washington Life Insurance Company v. Gooding, 49 S. W. Rep. 123). While the opinion cited is the opinion of an intermediate appellate court, a foot-note to the report shows that a writ of error was denied by the Texas Supreme Court, which under the Texas practice was an approval of the judgment of the intermediate appellate court.

It was thus impossible for the Insurance Company to protect itself by an interpleader suit, because if the suit was brought in Georgia it would not bind Cohen, and if in Texas it would not bind Hilsman, and if in New York or any other State, it would not bind either.

Under these circumstances the Insurance Company paid Hilsman $5,750, being the full face of said policies, less the amount of said loans, and said policies were thereupon receipted in full by Hilsman and surrendered to the Insurance Company. Before making such payment the Insurance Company obtained an indemnity bond from Hilsman. The record recites that this "payment was made because the Insurance Company was advised that Hilsman was entitled to collect the same, and that in any event the aforesaid indemnity would protect it, and because it was advised that it was not practicable to secure a determination of the controversy in a suit where the court would have proper and sufficient jurisdiction of all the parties to the subject matter. It was not the purpose of the Insurance Company to contest or delay the payment, and the payment to Hilsman was made under the circumstances above set out" (P. R. pp. 28-29).

Article 3071, Revised Statutes of Texas (1905) provides as follows:

"In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay *the holder of such policy,* in addition to the amount of the loss, twelve per cent damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss."

Prior to the decision in the present case it had been the established construction of this statute that "the proper construction of Article 3071 is that the penalty and attorney's fees may be assessed when authorized, after demand, and *willful* failure to pay the proceeds of the policy. There is no such failure when there are rival claimants. Failure to pay under such circumstances is not the failure to pay that is contemplated by the statute, for in that case the insurance company is not refusing, but is offering to pay, when it is determined to whom payment must be made" (Southwestern Insurance Company v. Woods National Bank, 107 S. W. 114-119).

Under these circumstances defendant in error, David Cohen, executor, claiming that under the law of Texas the assignments of the policies to Hilsman were contrary to public policy and void, brought suit against the Insurance Company in the District Court of Harris County, Texas, and obtained judgment for $6,459.17, being the amount of said policies, with interest, less the amount of said $875 loans, and for the additional sum of 12 per cent statutory damages, amounting to $690, and for the additional sum of $700 statutory attorney's fees. The court even refused to deduct the $460 that Cohen had secured from Hilsman in payment of said policies (P. R. pp. 17-18).

A motion for a new trial having been overruled (P. R. p. 20), the Insurance Company appealed to the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, where the judgment of the District Court was affirmed (P. R. p. 47). The Insurance

Company thereupon filed a motion for rehearing (P. R. p. 48), which was overruled (P. R. p. 52). The Insurance Company then applied to the Supreme Court of Texas for a writ of error P. R. p. 52), which application was refused (P. R. p. 60), and a motion for rehearing in said Supreme Court was also made and overruled (P. R. pp. 60-62).

The Insurance Company and the surety on its appeal bond then applied for and obtained a writ of error from the Supreme Court of the United States, all the proceedings being regular (P. R. pp. 63-76).

The Insurance Company's assignments of error in said Court of Civil Appeals were as follows:

"1. The court erred in rendering judgment for the plaintiff for any amount, because the evidence shows conclusively that the defendant Insurance Company had paid the full amount due on the life insurance policies to J. H. Hilsman, who in any view of the law or facts had at least sufficient interest in said policies to authorize him to collect the same, and the payment to Hilsman discharged the Insurance Company from liability, and any claim that plaintiff may have is against Hilsman, and not against the Insurance Company.

2. The court erred in rendering judgment for the plaintiff for any amount because the evidence shows conclusively that the insurance policies were transferred to J. H. Hilsman by valid transfers delivered and consummated in the State of Georgia; that under the laws of Georgia, such transfers were valid and that plaintiff had no interest in said policies.

3. The court erred in rendering judgment for the plaintiff for any amount, because the evidence shows that the insurance policies were transferred by the insured to J. H. Hilsman as part of an illegal transaction of such a character that plaintiff is entitled to no relief in law or in equity.

4. The court erred in rendering judgment for the plaintiff for statutory damages and for attorney's fees because there is no evidence that the Insurance Company failed to pay the policies within

the time specified in the policies after demand made therefor, within the true spirit and proper construction of the statute, and the evidence does show that there was no such failure or refusal to pay as is contemplated by the statute.

5. *The court erred in rendering judgment for the plaintiff for statutory damages and for attorney's fees, because the Texas Statute, Revised Statutes, Article* 3071, *AS CONSTRUED IN THIS CASE, is in conflict with and in violation of Section* 1, *Article* 14, *of the Amendments to the Constitution of the United States.*

6. The court erred in rendering judgment for $700 attorney's fees because such amount is excessive and unreasonably large.

7. The court erred in failing and refusing to allow credit for the $460 paid by J. H. Hilsman to the insured, and interest thereon from date of such payment, and the judgment of the court is excessive."

These assignments of error were renewed in all subsequent proceedings in the Court of Civil Appeals and Supreme Court, with other assignments to which we will not now refer (P. R. pp. 48, 52, 60).

On writ of error from the United States Supreme Court, plaintiffs in error have filed the following assignments of error:

FIRST.

"The Court of Civil Appeals erred in overruling and refusing to sustain the original assignment of error number one, of said appellant, Insurance Company, to the effect that the court erred in rendering judgment for the plaintiff for any amount, because the evidence shows conclusively that the defendant Insurance Company had paid the full amount due on the life insurance policies to J. H. Hilsman, who in any view of the law or facts had at least sufficient interest in said policies to authorize him to collect the same, and the payment to Hilsman discharged the Insurance Company from liability, and any claim that plaintiff may have is against Hilsman, and not against the Insurance Company.

Said ruling deprived appellant Insurance Company of rights,

privileges and property without due process of law, and denied appellant the equal protection of the laws, and unlawfully abridged privileges and immunities of citizens of the United States to discharge contracts which were valid when and where they were made, in violation of Section 1, Article 14, of the Amendments to the Constitution of the United States, and said ruling was also in violation of Section 10, Article 1, of the Constitution of the United States, prohibiting the enforcement of laws impairing the obligations of contracts.

SECOND.

The Court of Civil Appeals erred in overruling and refusing to sustain the original assignment of error number two of said appellant Insurance Company, to the effect that the court erred in rendering judgment for plaintiff for any amount, because the evidence shows conclusively that the insurance policies were transferred to J. H. Hilsman by valid transfers delivered and consummated in the State of Georgia; that under the laws of Georgia such transfers were valid contracts and that plaintiff has no interest in said policies.

Said ruling deprived appellant Insurance Company of rights, privileges and property without due process of law, and denied appellant the equal protection of the laws, and unlawfully abridged privileges and immunities of citizens of the United States to make contracts which are valid when and where they are made, in violation of Section 1, Article 14, of the Amendments to the Constitution of the United States, and said ruling was also in violation of Section 10, Article 1, of the Constitution of the United States, prohibiting the enforcement of laws impairing the obligation of contracts.

THIRD.

The Court of Civil Appeals erred in overruling and refusing to sustain the original assignment of error number five of appellant, Manhattan Life Insurance Company of New York, to the effect that the court erred in rendering judgment for plaintiff

for statutory damages and for attorney's fees, because the Texas Statute, Revised Statutes, Article 3071, *AS CONSTRUED IN THIS CASE, is in conflict with and in violation of Section* 1, *Article* 14, *of the Amendments to the Constitution of the United States, providing that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.*

FOURTH.

The Court of Civil Appeals erred in overruling and refusing to sustain the original assignment of error number seven of appellant Insurance Company to the effect that the court erred in failing and refusing to allow credit for the $460 paid by J. H. Hilsman to the insured, and interest thereon from date of such payment, and the judgment of the court is excessive.

Said ruling deprived appellant Insurance Company of rights, privileges and property without due process of law, and denied appellant the equal protection of the laws, and unlawfully abridged privileges and immunities of citizens of the United States, in violation of Section 1, Article 14, of the Amendments to the Constitution of the United States.

FIFTH.

The Court of Civil Appeals erred in deciding against the titles, rights, privileges and immunities specially set up and claimed by said Insurance Company under the Constitution and Statutes of the United States.

SIXTH.

The Court of Civil Appeals erred in affirming the judgment of the District Court, because plaintiff alleged and proved no valid cause of action against said Insurance Company" (P. R. pp. 73-75).

Any additional facts deemed relevant to this proceeding will be referred to in the following argument:

ARGUMENT.

Before discussing the specific question presented by the motion to affirm, we will first briefly allude to some other matters more or less connected with such question.

1. As in this case the Supreme Court of Texas denied the Insurance Company's application for a writ of error, it is settled that the writ of error from the United States Supreme Court is properly directed to the Court of Civil Appeals. Stanley v. Schwalby, 162 U. S. 255; Bacon v. Texas, 163 U. S. 216.

2. Admitting that there are grounds for contending that in the State court several objections to the judgment were not so presented as to raise Federal questions, there can be no doubt that the fifth assignment of error in the Court of Civil Appeals does raise a Federal question, unless defendant in error is correct in contending that this question has been foreclosed by previous decisions of this court; and that contention is the only matter now requiring serious attention. If by reason of the presence of a real and substantial Federal question properly raised in the State court this court has properly acquired jurisdiction of this *case*, how far this court may go in reviewing non-jurisdictional questions presented by the record is a matter to be considered at the hearing on the merits. We will observe, however, in passing, that the principal questions on the merits have already been clearly decided by this court in favor of the Insurance Company's contentions. See Grigsby v. Russell, 222 U. S. 149, sustaining an assignment of a life insurance policy, and Northwestern Mutual Life Insurance Company v. McCue, 223 U. S. 234, under which it is plain that the assignment to Hilsman in this case was a Georgia contract, valid by the laws of that State.

3. We will now discuss the contention of defendant in error that previous decisions of this court foreclose the Federal question raised by the Insurance Company's fifth assignment of error in the Court of Civil Appeals (P. R. pp. 22-23), and third assignment of error in this court (P. R. p. 74), attacking the Texas penalty and attorney's fee statute as applied in this case.

We are aware of the fact that in previous cases, and under the particular facts of these cases, and under the particular construction then given by the Texas courts to the statute under consideration, that statute was sustained by this court. Fidelity Mutual Life Ins. Co. v. Mettler, 185 U. S. 308; Iowa Life Insurance Company v. Lewis, 187 U. S. 204; and under like circumstances, and under a like construction, a somewhat similar statute was sustained in Farmers' & Merchants' Ins. Co. v. Dobney, 188 U. S. 301. However, in G. C. & S. F. Ry. Company v. Ellis, 165 U. S. 150, and St. Louis, etc., Ry. Company v. Wynne, 224 U. S. 354, other penalty statutes, as construed and applied in these cases, were declared wanting in due process of law, and repugnant to the 14th amendment to the Constitution of the United States.

In undertaking to ascertain which of these lines of decisions more closely applies to the present case, we will first observe that we understand it to be the general rule that on writ of error to a State court, presenting the question whether or not a State statute violates a Federal right, this court will accept the construction placed upon the State statute by the State court of last resort, and will then determine whether or not the statute, as thus construed, and as applied to the particular facts before the court, violates a Federal right. It may thus occur that this court will sustain a State statute, as construed one way, or as applied to one state of facts, while as construed a different way, or as applied to a different state of facts, the statute would be declared violative of a Federal right. See St. Louis, etc., Ry. Company v. Wynne, 224 U. S. 354; Yazoo, etc., Ry. Company v. Jackson Vinegar Company, 226 U. S. 217.

We desire to call particular attention to the fact that in this case the Insurance Company has not made any unqualified attack on the statute in question. On the authority of Southwestern Insurance Company v. Woods National Bank, 107 S. W. 114,118, cited *supra*, decided by the same Court of Civil Appeals, the Insurance Company first contended that the statute had no application to the facts of this case, when the company was not denying

liability, but was merely seeking to avoid double liability. (See fourth assignment of error, P. R. p. 22). That contention having been overruled in the District Court, and the statute having been construed as applying to this case, the Company, by its fifth assignment of error in the Court of Civil Appeals (P. R. p. 22), presented the issue that the statute "*as construed in this case*, is in conflict with and in violation of Section 1, Article 14, of the Amendments to the Constitution of the United States." The Federal question was thus clearly and precisely presented, and as thus presented, it has *never* arisen in any previous case in this court reviewing this Texas statute, because in the previous cases the Insurance Companies were held to have wrongfully denied liability. But we respectfully submit that the Federal question now presented *was* decided, at least in principle, in reviewing an Arkansas statute in the recent case of St. Louis, etc., Ry. Company v. Wynne, 224 U. S. 354.

In that case it appeared that a statute of Arkansas imposed a penalty and attorney's fees on railroad companies for failing promptly to pay claims for damages to live stock. Wynne presented a claim for $500 damages, which the railroad company refused to pay. Wynne then sued for $400 (being $100 less than his original demand) and recovered judgment for $400 and the statutory damages and attorney's fees. The judgment having been affirmed by the Supreme Court of Arkansas, the case was brought on writ of error to this court, which reversed the judgment. This court declined to say whether or not the statute would be sustained if applied to a different state of facts, but declared that "*confining ourselves to what is necessary to a decision of the case in hand, we hold that the statute, as construed and applied by the State courts*, is wanting in due process of law, and repugnant to the 14th Amendment of the Constitution of the United States." In the Wynne Case this court thus sustained precisely the same contention that the Insurance Company is making in the present case, not that the statute under consideration is violative of the Fourteenth Amendment in all cases and under all circumstances,

but that as construed and applied by the State courts in the particular case now before the court, the statute is wanting in due process of law, and violative of Federal right.

In the Wynne Case this court pointed out that in another case the Supreme Court of Arkansas, construing another penalty statute, had held in principle to the contrary, just as in the present case we have pointed out that in another case the same Texas Court of Civil Appeals had held that the penalty statute now under consideration has no application to an insurance company that admits liability, but merely seeks to avoid double liability. Insurance Company v. Bank, 107 S. W. 114, 119, cited *supra*. But in this court, in determining whether or not a Federal right has been violated, while reference may be made to other cases illustrating the versatility of the State courts, the question will be decided here on the construction placed by the State courts on the State statute in the particular case under review, just as was done in the Wynne Case.

In the Wynne Case the statute was held violative of Federal right on the ground that the railroad company rightfully refused payment of an excessive demand; and we understand the principle of the Wynne Case to be that a litigant cannot be penalized by a State statute, for exercising a clear right to avoid payment of an excessive or improper demand, without violating a Federal right, whatever might be held where the litigant had wrongfully resisted a wholly rightful demand, a question not then before this court.

When the facts are analyzed it seems plain that in the present case the argument against the Texas statute, as construed and applied in this case, is in all respects as strong, and in some respects even stronger, than the argument against the Arkansas statute that in the Wynne Case this court held sufficient to condemn such statute as construed by the State courts in that case.

In the Wynne Case the railroad company appears to have denied liability for any amount; at least it does not appear that the railroad company ever admitted liability for any amount. It was therefore, to some extent, in the attitude of wrongfully resisting

a rightful demand. It may not unreasonably be supposed that if the railroad company had admitted liability for the amount for which it had been sued, this amount having on the trial been found correct, and had tendered payment of such amount, the tender would have been accepted in full of all demands, and the question of penalties would thus not have arisen. But this court declined to enter into any such speculations. The Arkansas statute, like the Texas statute, made no provision for a tender after suit brought, and merely because before suit the plaintiff had made a demand for more than he sued for and recovered, and the penalty was based on failure to comply with such previous demand, this court condemned the statute as wanting in due process of law.

On the other hand, in the present case the Insurance Company admitted liability from the beginning for the full amount of the demands against it, and offered to pay such demands promptly on the sole condition that it be protected against double liability. The situation which presented the double demand was not in any respect of the Insurance Company's making, or under its control. It was caused by the act of Cohen, deceased, in assigning his policy to Hilsman; and Cohen, executor, plaintiff below, and defendant in error here, stands in the shoes of Cohen, deceased, claiming statutory penalties and attorney's fees against the Insurance Company for the consequences of an act of Cohen, deceased, for which the Insurance Company was not in the slightest degree responsible. Not only this, but vicarious punishment is visited on the Insurance Company, and Cohen, executor, is rewarded, not only for an act of Cohen, deceased, held to have been illegal, but solely on the ground that it was illegal. Is this in accordance with due process of law? Unless the act of Cohen, deceased, in assigning the policies to Hilsman, was illegal, Cohen, executor, not only had no cause of action for penalties and attorney's fees, but he had no cause of action for any amount.

It is elementary that a mere stake-holder of a fund against which conflicting claims are asserted has a right to have the conflict determined before he can be compelled to pay to either claim-

ant. Not only this, but the courts of Texas have heretofore held, in accordance with the general rule of equity on the subject, not only that such a stakeholder cannot be penalized because of his innocent connection with a dispute to which he is not a party, but that instead of paying attorney's fees to the successful claimant, he is entitled to his own necessary costs and attorney's fees out of the fund as a credit against the successful claimant. Bolin v. St. Louis, etc., Ry. Company, 61 S. W. 444.

It is not only the right of a party to protect himself against illegal demands or double liability, but this court has held directly in R. R. Company v. Wynne, 224 U. S. 354, discussed *supra*, that this right is a Federal right; and that to penalize its exercise under the assumed authority of a State statute is repugnant to the Fourteenth Amendment. The artificial difficulties interposed in this case to the prompt and certain enforcement of this right by the Insurance Company, when such difficulties are attributable solely to Cohen, deceased, and Cohen, executor, and which made it necessary for the Insurance Company to take the course it pursued in this case, merely serve to emphasize the injustice and fundamental illegality, from the standpoint of due process of law, of the penalty imposed on the Insurance Company by the judgment of the State courts. In this case, and for the purpose of reviewing the Federal question now under consideration, it would be wholly irrelevant to inquire whether or not the courts of Texas are correct in holding in Washington Life Insurance Company v. Gooding, 49 S. W. 123, discussed *supra*, that substituted service beyond the State is insufficient in a suit to determine conflicting claims to the proceeds of a life insurance policy. It should be sufficient, for present purposes, merely that the courts of Texas have so held. The laws of a State are not isolated and independent entities. The statutes of Texas and the decisions of her courts affecting the rights and remedies of the Insurance Company constituted a single collective unit with which it was compelled to deal. The Insurance Company, as a mere stakeholder, was under no equitable obligation to litigate any question whatever for the benefit of either of the

conflicting claimants. Much less was it under obligation for any such purpose to assume the risk and burden of securing a reversal of the settled doctrine of the Texas courts, whether such doctrine was sound or unsound. Cohen, deceased, and Cohen, executor, are solely responsible for the situation in which the Insurance Company was placed. Cohen, deceased, for private purposes of his own, voluntarily transferred his insurance policies to a foreign jurisdiction. Cohen, executor, refused to submit to that jurisdiction, although the Insurance Company offered to do so for the purpose of determining the rights of the conflicting claimants. The Insurance Company then resorted to the only course of procedure remaining open. It paid the money to Hilsman, taking an indemnity bond in return, and when it was sued by Cohen, executor, in Texas, it defended the suit. If it had paid Hilsman without taking an indemnity bond, under familiar and elementary principles such voluntary payment would have deprived it of recourse against Hilsman in case of subsequent recovery by Cohen, executor. On the other hand, having taken an indemnity bond from Hilsman, if it had refused to defend the Cohen suit, or permit Hilsman to defend the suit in its name, such refusal would have discharged Hilsman from liability on the indemnity bond. This is one elementary proposition of law in which the courts of Texas concur. Illies v. Fitzgerald, 11 Texas, 429. Therefore, in defending this suit, or permitting it to be defended—and it is absolutely immaterial which it was,—the Insurance Company was plainly doing the only thing it could do legally in order to protect itself against double liability.

While we think that what we have said is plainly correct, it is not necessary to go that far in order to hold that the Federal question in this case was erroneously decided by the State courts. We regard the case of Railroad Company v. Wynne, 224 U. S. 354, discussed *supra*, as definitely settling the correctness of the propositions that every party to a controversy has the right to resist excessive demands, and of course a threat of double liability is an excessive demand; and that when this right of just resistance

is penalized by the construction placed by State courts on a State statute, such statute, when thus construed and applied, is wanting in due process of law, and repugnant to the Fourteenth Amendment. When unjust demands are justly resisted, it should make no difference whether the mode of resistance selected is the only mode or not. If it is a proper mode, that should be sufficient; and there can be no question that in paying Hilsman, and taking an indemnity bond, and then defending the Cohen suit, or permitting it to be defended, the Insurance Company pursued a proper mode of procedure for the protection of itself against illegal demands. The fact that under the decision of the Texas courts in Insurance Company v. Gooding, *supra*, this was the only proper mode of procedure, merely adds unnecessary emphasis to the correctness of its position. As heretofore stated, in the Wynne Case the railroad company could have tendered the amount justly due, without prejudice to its actual rights; and if this tender had been accepted it would have suffered no penalty. And yet this court held that such tender was not necessary. On the other hand, in the present case the Insurance Company was compelled to resist the Cohen suit in order to preserve its rights. Therefore, if there is any distinction between the present case and the Wynne Case, that distinction is an additional reason for holding that the Federal question in this case was erroneously decided by the State courts.

While we are not asking this court to overrule, or even qualify, any of its previous decisions, we deem it not improper to observe that in the Mettler Case, *supra*, there was a vigorous dissenting opinion by Mr. Justice Harlan, in which Mr. Justice Brewer concurred. The Lewis Case, so far as the question under consideration is concerned, is not distinguishable from the Mettler Case, and it was decided on the authority of that case; and in the Dobney Case Justices Harlan, Brewer and Brown dissented.

These are the cases relied on by defendant in error to sustain their proposition that the Federal question now presented has been foreclosed against us.

On the other hand, in the more recent Wynne Case, upon

which we rely, the opinion of this court appears to have been unanimous.

It thus appears that even the Justices of this court have sometimes experienced difficulty in determining questions of this character, when applying old decisions to new combinations of facts. We recognize the general rule that a Federal question may have been so explicitly foreclosed by previous decisions as to afford no basis for a writ of error from this court. Leonard v. Vicksburg, etc., Ry Company, 198 U. S. 416. But this rule has no application where analysis and exposition are necessary in order to make clear the decisive effect of such prior decisions upon the issue presented. If there is fair ground to contend that the case at bar is distinguishable from prior decisions relied upon as eliminating the Federal question, the writ of error will be sustained. Louisville, etc., Ry. Company v. Melton, 218 U. S. 36.

If we have succeeded in making ourselves at all clear, we think that we have shown not only that the Federal question upon which we rely to sustain the jurisdiction of this court has not been foreclosed against us by the decisions cited by defendant in error, but that this Federal question has been at least practically foreclosed in our favor by the more recent and unanimous opinion of this court in the Wynne Case; and that not only should the jurisdiction of this court be sustained—which is all that is now before the court—but that on the hearing the judgment of the State court should be reversed.

The jurisdiction of this court being clearly established, as we respectfully submit, how far this court may go in reviewing non-jurisdictional questions presented by the record is a question to be considered on the hearing on the merits. In this proceeding that question is not before the court. However, as a reason why this case should not be summarily disposed of on motion, we deem it proper to anticipate briefly, and observe that, notwithstanding various expressions in the opinions of this court, when such expressions are divorced from the actual issues decided, we expect to show that this court has ample jurisdiction to render a just

judgment in this case, and correct what is in effect, if not in purpose, an arbitrary confiscation of the rights of the Insurance Company. Because it can be demonstrated that on every material question the decision of the State courts in this case is not only contrary to the decisions of this court, and the courts of Georgia and New York, but contrary to a long line of Texas decisions that remained unbroken and unquestioned until the decision of this case. This is the first case in Texas, or anywhere else, so far as we are advised, holding on grounds of public policy that an assignment of a life insurance policy for a valuable consideration is absolutely void.

It has heretofore been the established doctrine of the courts of Texas that the assignee of the policy would be treated as a trustee, with the right to collect, and a pledgee for the amounts he may have paid in purchasing the policy, and in paying subsequent premiums, and interest on such amounts; and that he would be held accountable as trustee merely for the surplus. Schonfield v. Turner, 75 Texas, 324; Pacific Mutual Life Insurance Company v. Williams, 79 Texas, 633; Cheeves v. Anders, 87 Texas, 287. Under these decisions when Cohen, executor, refused to become a party to an interpleader suit in a court of competent jurisdiction over the parties, it was the plain right of the Insurance Company to pay Hilsman, and such payment by the Insurance Company to Hilsman completely discharged its liability; and if Cohen, executor, claimed any interest in the proceeds it was his remedy to demand an accounting from Hilsman. We deem it proper to allude to this line of decisions, even on this proceeding, in further illustration of the gross injustice and plain absence of due process of law, and denial of the equal protection of the laws, in penalizing the Insurance Company under a Texas statute because it had done what the Supreme Court of Texas had repeatedly declared that it was its plain duty to do. While the *decision* of the Supreme Court of Texas, in denying the Insurance Company's application for a writ of error, *without a written opinion*, in effect overrules in this case everything that court had previously decided

to be the law, no *opinion* of the Supreme Court of Texas has ever qualified the decisions above cited; and we confidently predict that no *opinion* of that court will ever sustain its *decision* in this case.

Can this court properly consider suggestions of this character?

While the original jurisdiction of this court is conferred directly by the Constitution, its appellate jurisdiction is statutory. The 25th Section of the Judiciary Act of 1789, conferring appellate jurisdiction on this court over State courts in cases involving certain classes of Federal questions, expressly limited this court's right of review to the Federal questions presented by the record. But the Act of Congress, approved February 5, 1867, removed this limitation, and, so far as the terms of this statute, as thus amended, are concerned, this court, on writ of error to a State court, now appears to have the same right of review that it has on writ of error to an inferior Federal court; and we understand that on writ of error to an inferior Federal court this court has jurisdiction to review the entire case, with certain special statutory exceptions not connected with the present inquiry. See Taylor on the Jurisdiction and Procedure of the United States Supreme Court, Sections, 179, 180.

Our present remarks are predicated on the well settled distinction between jurisdiction of a *question*, and jurisdiction of a *case*, and on the further distinction between jurisdiction of a *question* or *case*, and the rules to be observed in exercising that jurisdiction. For example, on certified question the court acquires jurisdiction of such question only. Under the 25th Section of the Judiciary Act, until it was amended by the Act of 1867, this court acquired jurisdiction of Federal questions only; but that statutory limitation does not now exist. The only exception we now recall is that, under a comparatively recent statute, when on writ of error to a State court it appears that the case had been remanded by a Federal court, the question of the right of removal is not reviewable by this court. This exception, as the record will show, was incidentally involved in Pardee v. Aldridge, 189 U. S. 429, although not alluded to in the opinion of this court in that case. Likewise,

the Eleventh Amendment, prohibiting certain suits against States, is a limitation on the Federal jurisdiction itself.

On the other hand, the Seventh Amendment declares that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." That provision is not a limitation on the *jurisdiction* of Federal courts; it is merely a constitutional limitation on the mode of exercising such jurisdiction in jury cases. Likewise, when a question of local law comes before this court, the settled construction of the State courts will generally be accepted by this court, not because of lack of jurisdiction, but because the settled construction placed by a State court of last resort on a question of local law is the highest authority on such law, just as in Federal courts the verdict of a jury is the highest authority on a question of fact, when such verdict has been properly rendered according to the rules of the common law.

We think that the recent case of G. C. & S. F. Ry. Co. v. Dennis, 224 U. S. 503, clearly illustrates the distinction we are undertaking to draw. That case came here on writ of error to an inferior Texas court—the highest State court to which the case could be appealed. The *jurisdiction* of this court depended solely on a Federal question, whether or not a State statute was repugnant to the Fourteenth Amendment. While the case was pending in this court, the Supreme Court of Texas, in another case, held that this statute was void because it was repugnant to the Constitution of Texas. For this reason this court reversed and remanded the Dennis Case, without stopping to decide the Federal question which was the sole source of the jurisdiction of this court. Here the judgment was reversed by this court, not because the State court had erroneously decided a Federal question, but because it had erroneously decided a question of purely local law. However, as the State court was a court of inferior jurisdiction, and as the Supreme Court of Texas had subsequently decided in another case that the statute was repugnant to the State Constitution, this court followed that decision as the highest au-

thority on the local law, and in doing so this court was exercising its jurisdiction to review this question, and not denying that its jurisdiction existed. If this court had jurisdiction at all, it acquired such jurisdiction when its writ of error was issued to the State court. The subsequent and carefully reasoned opinion of the Supreme Court of Texas in deciding a question of local law in another case might well guide this court in reviewing the same question in the case before this court; but such subsequent opinion of the Supreme Court of Texas could not confer, *nunc pro tunc*, a jurisdiction on this court that was originally wanting, especially when such subsequent State decision had nothing to do with any Federal question.

The opinion of this court in Pardee v. Aldridge, 189 U. S. 429, is brief, but when the record is examined it appears that this court, having acquired jurisdiction of the *case*, on writ of error to a State court, by reason of a Federal question, proceeded to decide every material question in the case, Federal and non-Federal. The writer was of counsel in that case, and the above statement is based in part on his personal familiarity with the record, of which record this court, of course, has judicial knowledge.

The distinction is further illustrated by the familiar rule that when a Federal court acquires original jurisdiction of a *case* by reason of a Federal question, the court thereby acquires jurisdiction to hear and determine every question in the case, though the Federal question upon which the jurisdiction of the court depends may not be the subject of actual controversy. Pacific Removal Cases, 115 U. S. 1.

However, in order properly to decide this case it is not necessary for this court to consider any question of Texas local law, as was done in the Dennis Case. Whether the assignment to Hillsman was a Texas contract or a Georgia contract, and whether or not the assignment was valid under the local law of Georgia, or as a matter of general law, are questions that invite no inquiry into the local law of Texas. Indeed, as the policies were by their terms assignable (P. R. p. 25), and as it was proved on the trial

of this case that Section 2116 of the Civil Code of Georgia expressly made life insurance policies assignable (P. R. p. 39), and that the assignments in question were actually delivered in Georgia (P. R. p. 28), it now seems to us that the denial of the validity of said assignments by the courts of Texas was in violation of the "full faith and credit" clause (Article 4, Section 1), of the Constitution of the United States; and although this proposition may not have been so presented in the State courts as to *confer* jurisdiction on this court, nevertheless, this court, having properly acquired jurisdiction of the *case* by reason of another Federal question, has the unquestionable right to decide at least every Federal question in the case; and this includes the right to decide every non-Federal question incidental to the correct determination of the Federal questions. Taylor on Jurisdiction and Procedure of the United States Supreme Court, Sections 179, 180. In the Dartmouth College Case (4 Wheat 518), which came here on writ of error to a State court, on the Federal question whether or not a State statute impaired the obligation of a contract, it was held that this court had the right to determine for itself the preliminary non-Federal question whether or not a contract existed, and this case was decided when the statute in terms limited this court's right of review, on writ of error to a State court, to Federal questions, a limitation that was removed by the Act of 1867. Likewise, and for even more obvious reasons under the present statute, although the question whether the assignments to Hilsman were Texas contracts or Georgia contracts may not of itself be a Federal question, nevertheless this court has the right to decide that question for itself, preliminary to the decision of the Federal question whether or not the courts of Texas have denied full faith and credit to the Georgia statute expressly authorizing such assignments; and Grigsby v. Russell, 222 U. S. 149, and the McCue Case, 223 U. S. 234, have already decided these questions in our favor.

We have attempted in this argument to give prominence to what we consider the legal principles involved, rather than to present a

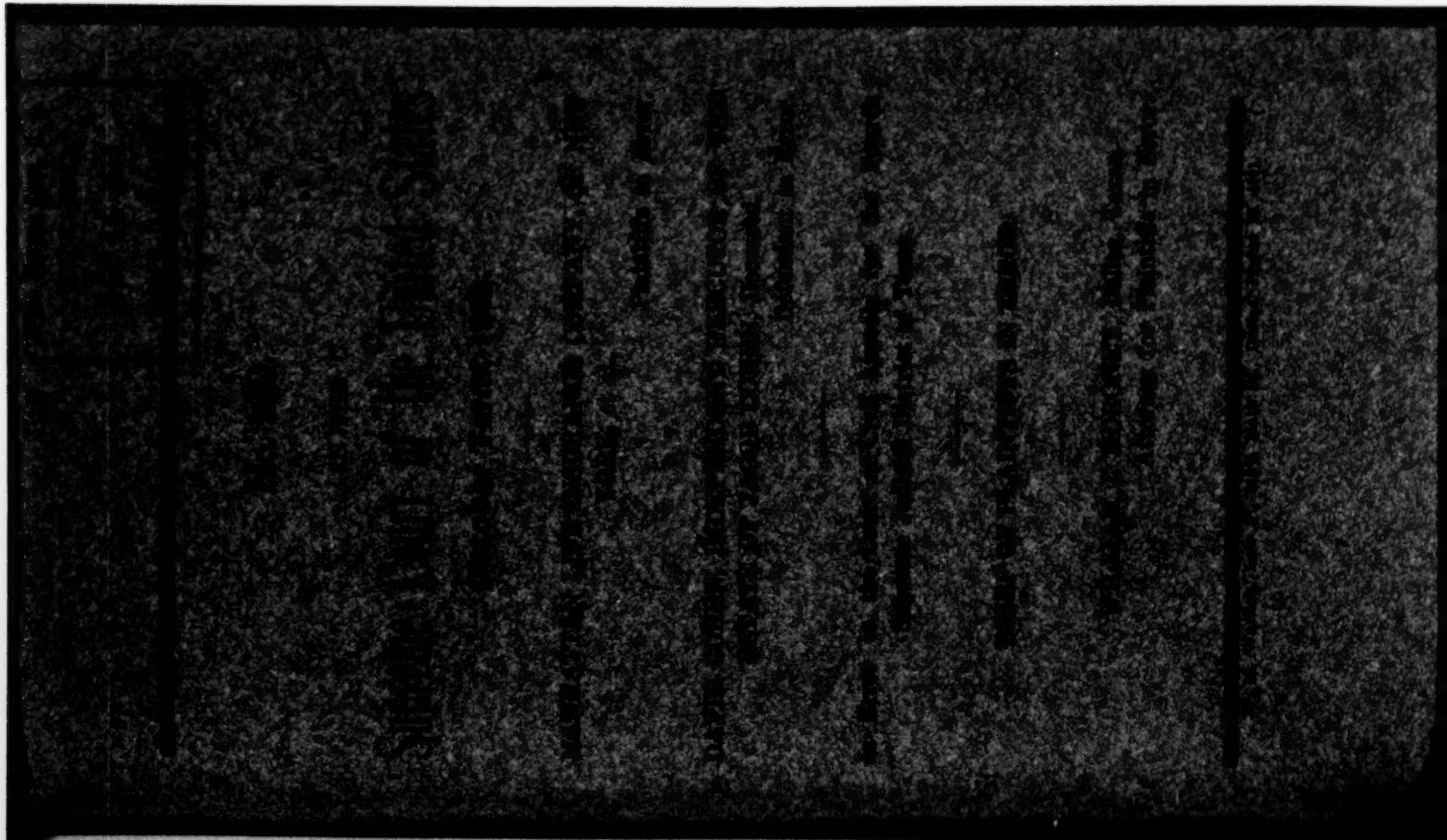
voluminous citation of authorities. We will cite additional authorities and discuss other questions on the hearing, if given an opportunity to do so, but we think what we have said is sufficient to show not only that this court has jurisdiction of this case by reason of a real and substantial Federal question properly raised and presented—which is all that need be considered now—but that it also has jurisdiction to render a judgment that will do full and complete justice between the parties to this suit.

Respectfully submitted,

WILLIAM J. MORONEY,

Dallas, Texas,

Attorney for Plaintiffs in Error.



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Constitutional Provisions Cited.

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No. 160.

IN THE

Supreme Court of the United States

October Term, 1913.

MANHATTAN LIFE INSURANCE COMPANY, OF NEW YORK, et al.,

Plaintiffs in Error,

v.

DAVID COHEN, INDEPENDENT EXECUTOR OF THE ESTATE OF JACOB COHEN, Deceased,

Defendant in Error.

In Error to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

On June 30, 1910, defendant in error, David Cohen, independent executor of the estate of Jacob Cohen, deceased, recovered judgment against plaintiff in error, the Manhattan Life Insurance Company of New York, in the District Court of Harris County, Texas, for $5750, being the

principal and interest of two life insurance policies issued by said Insurance Company on the life of said Jacob Cohen, less the amount of certain loans the Insurance Company had made to the insured on the security of said policies, and said plaintiff also recovered judgment against said Insurance Company for a statutory penalty of 12 per cent., amounting to $690, and $700 statutory attorneys fees, with costs of suit and legal interest from date of judgment (Printed Record, pp. 17-18).

The Insurance Company filed a motion for a new trial, which was overruled (P. R. pp. 18-21). It then appealed to the Court of Civil Appeals, where the judgment of the District Court was affirmed (P. R. p. 47). It then filed a motion for rehearing, which was overruled (P. R. p. 52). It then made application to the Supreme Court of Texas for a writ of error, which application was denied (P. R. p. 60). It then sued out a writ of error from the United States Supreme Court to said Court of Civil Appeals, and the case is now before this Court on such writ of error (P. R. pp. 63-73). In accordance with its general practice, the Supreme Court of Texas, in denying the application for a writ of error, delivered no written opinion. The opinion of the Court of Civil Appeals is in the record (P. R. pp. 34-47).

This case arose out of a controversy as to who was entitled to collect the proceeds of said life insurance policies, such proceeds having been claimed, on the one hand, by the insured's assignee, J. H. Hilsman, of Atlanta, Georgia, and, on the other hand, by the insured's executor, the latter claiming that the assignments were void on the broad ground, which was sustained by the State courts,—that assignments of life insurance policies are contrary to public policy and void.

The case embraces the questions whether or not a certain Texas statute, imposing penalties and attorney's fees,

as construed and applied in this case, is repugnant to the Fourteenth Amendment, and whether or not the judgment of the State court denied full faith and credit to certain statutes of Georgia, in violation of Article 4, Section 1, of the Constitution of the United States, and various other questions which will be hereafter referred to.

The material facts, which are undisputed, are as follows: On April 7, 1893, the Manhattan Life Insurance Company of New York issued to Jacob Cohen, then residing in Galveston County, Texas, two policies of insurance on his life for $3750 each. The policies were in terms assignable, being payable, in case of the insured's death, to his executors, administrators, or assigns. The policies were by their terms payable at the office of the Insurance Company in the City of New York, and they recite that they were signed, sealed and delivered in New York (P. R. pp. 11, 12, 35). There is nothing in the record qualifying the facts thus stated, showing that the policies were New York contracts.

On July 15, 1907, the insured borrowed $875 on each of said policies from the Insurance Company, pledging the policies to the Company as security (P. R. p. 26).

Immediately thereafter the insured sold and assigned said policies, subject to said pledges, to J. H. Hilsman, of Atlanta, Georgia, for $460. The transaction was effected by Cohen, the insured, in San Antonio, Texas, making a bank draft on Hilsman, in Atlanta, for $460, with written assignments of the policies attached to the draft, which assignments were delivered to Hilsman in Atlanta, Georgia, on his payment of said draft on July 19, 1907 (See assignments, P. R. pp. 12-15, and correspondence closing contract, P. R. pp. 26-28).

Hilsman was not related to Cohen, nor did Hilsman have any interest in the life of Cohen other than through this

transaction (P. R. p. 28). But it was pleaded and proved by the Insurance Company on the trial of this case that under the statutes of Georgia, where Hilsman resided, and where the assignments of the policies were delivered, such assignments were in all respects valid, notwithstanding the fact that Hilsman had no insurable interest in Cohen's life except by the purchase of said policies (P. R. pp. 10, 30-32). These statutes will be hereinafter quoted in full.

On October 16, 1907, Jacob Cohen, the insured, died in Harris County, Texas. Said policies were then in full force and effect, subject to the Insurance Company's rights under said loans, aggregating $1750 (P. R. p. 25). Jacob Cohen left a will appointing David Cohen independent executor of his estate. Said will was duly probated and said executor duly qualified (P. R. pp. 25, 26).

It is established by stipulation of the parties that on April 10, 1908, the Insurance Company received proofs of death from both Hilsman, assignee, and Cohen, executor; that each claimant objected to the Insurance Company paying the other; that Hilsman, assignee, advised the Insurance Company that he claimed the right to receive the face of said policies, less the amount of said loans, aggregating $1750; that Cohen, executor, advised the Insurance Company that he also claimed the right to receive the face of said policies, less the amount of said loans, on the ground that Hilsman had no insurable interest; that the assignments to him were illegal and void for that reason, and also for the reason that said assignments were part of a gaming transaction; that the Insurance Company admitted liability for the face of the policies, less the amount of said loans, and offered to pay the same to the joint order of the rival claimants, or to pay the money into court if the matter could be so arranged that the parties would appear and interplead in a court of competent jurisdiction where any

judgment that might be rendered would fully protect the Insurance Company from double liability; that said rival claimants failing to reach any agreement, on May 6, 1908, Hilsman gave said Insurance Company a satisfactory indemnity bond, and the Insurance Company paid to Hilsman the sum of $5,750, being the full face of said policies, less the amount of said loans, and said policies were thereupon receipted in full by Hilsman and surrendered to the Insurance Company; that before paying said policies to Hilsman the Insurance Company had notice that Cohen, executor, claimed that said assignments were invalid, and that said Cohen, executor, claimed that he was entitled to recover them, but the payment was made because the Insurance Company was advised that Hilsman was entitled to collect the same, and that in any event the aforesaid indemnity would protect it, and because it was advised that it was not practicable to have a determination of the controversy in a suit where the court would have proper and sufficient jurisdiction of all the parties and the subject matter; that it was not the purpose of the Insurance Company to contest or delay payment, and the payment to Hilsman was made under the circumstances above set out; that Hilsman has not been repaid said sum of $460 that he paid in purchase of the policies, and that the Insurance Company has not been repaid the amount of said loans, except as stated, and that nothing has yet been paid to Cohen, executor (P. R. pp. 28, 29).

Under these circumstances defendant in error, David Cohen, executor of the estate of Jacob Cohen, deceased, sued the Insurance Company and Hilsman in said District Court, but before the trial, as the judgment recites, "plaintiff in open court dismissed his cause of action against the defendant, J. H. Hilsman, for the reason that he is a nonresident of the State of Texas, and no jurisdiction had been

or could be acquired over him" (P. R. p. 17). The case then proceeded to trial against the Insurance Company, resulting in a judgment in favor of plaintiff as hereinbefore stated.

In explanation of the reason given by plaintiff for dismissing the suit as to Hilsman, it is deemed proper in this connection to observe that in a previous case it had been held by the Supreme Court of Texas that in a suit to determine the rights of rival claimants to the proceeds of a life insurance policy, substituted service on one of such claimants beyond the limits of the State where the suit was brought was not sufficient to bind the claimant thus served, on the ground that the suit was **in personam** and not **in rem** (Washington Life Insurance Company v. Gooding, 49 S. W. 123.) While the opinion cited is the opinion of an intermediate appellate court, a foot note to the report of the case shows that a writ of error was denied by the Texas Supreme Court (without a written opinion), which under the Texas practice was an approval of the judgment of the intermediate appellate court.

The judgment for penalties and attorney's fees was founded on Article 3071, Revised Statutes of Texas (1905), which provides as follows:

"In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to **pay the holder of such policy,** in addition to the amount of the loss, twelve per cent damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss."

In a previous case (Southwestern Insurance Company v. Woods National Bank, 107 S. W. 114, 119) it had been held by the same Court of Civil Appeals that decided this

case "that the proper construction of Article 3071 is that the penalty and attorney's fees may be assessed when authorized, after demand and **willful** failure to pay the proceeds of the policy. There is no such failure when there are rival claimants. Failure to pay under such circumstances is not the failure to pay as contemplated by the statute, for in that case the insurance company is not refusing, but is offering, to pay, when it is determined to whom payment must be made." This case was recently followed in principle. Fidelity Mut. Life Ins. Co. v. Zapp, October 22, 1913, 160 S. W. 139, 145.

The State courts, as will be seen, overruled the contention of the Insurance Company that the principles thus stated at least absolved it from penalties and attorney's fees.

ASSIGNMENTS OF ERROR IN STATE COURTS.

The Insurance Company's assignments of error in said Court of Civil Appeals were as follows:

"1. The court erred in rendering judgment for the plaintiff for any amount, because the evidence shows conclusively that the defendant Insurance Company had paid the full amount due on the life insurance policies to J. H. Hilsman, who in any view of the law or facts had at least sufficient interest in said policies to authorize him to collect the same, and the payment to Hilsman discharged the Insurance Company from liability, and any claim that plaintiff may have is against Hilsman, and not against the Insurance Company.

"2. The court erred in rendering judgment for the plaintiff for any amount because the evidence shows conclusively that the insurance policies were transferred to J. H. Hilsman by valid transfers delivered and consummated in the State of Georgia; that, under the laws of Georgia,

such transfers were valid, and that plaintiff had no interest in said policies.

"3. The court erred in rendering judgment for the plaintiff for any amount, because the evidence shows that the insurance policies were transferred by the insured to J. H. Hilsman as part of an illegal transaction of such a character that plaintiff is entitled to no relief in law or equity.

"4. The court erred in rendering judgment for the plaintiff for statutory damages and for attorney's fees, because there is no evidence that the Insurance Company failed to pay the policies within the time specified in the policies, after demand made therefor, within the true spirit and proper construction of the statute, and the evidence does show that there was no such failure or refusal to pay as contemplated by the statute.

"5. The court erred in rendering judgment for the plaintiff for statutory damages and for attorney's fees, because the Texas statute, Revised Statutes, Article 3071, as construed in this case, is in conflict with and in violation of Section 1, Article 14, of the Amendments to the Constitution of the United States.

"8. The court erred in rendering judgment for $700 attorney's fees, because such amount is excessive and unreasonably large.

"7. The court erred in failing and refusing to allow credit for the $460 paid by J. H. Hilsman to the insured, and interest thereon from date of such payment, and the judgment of the court is excessive."

These assignments of error were renewed in all subsequent proceedings in the Court of Civil Appeals and Supreme Court, with other assignments to which we will not now refer (P. R. pp. 48, 52, 60).

ASSIGNMENTS OF ERROR IN UNITED STATES SUPREME COURT.

On writ of error from the United States Supreme Court, plaintiffs in error have filed the following assignments of error:

FIRST.

"The Court of Civil Appeals erred in overruling and refusing to sustain the original assignment of error number one, of said appellant, Insurance Company, to the effect that the court erred in rendering judgment for the plaintiff for any amount, because the evidence shows conclusively that the defendant Insurance Company had paid the full amount due on said life insurance policies to J. H. Hilsman, who in any view of the law or the facts had at least sufficient interest in said policies to authorize him to collect the same, and the payments to Hilsman discharged the Insurance Company from liability, and any claim that plaintiff may have is against Hillsman, and not against the Insurance Company.

Said ruling deprived appellant Insurance Company of rights, privileges and property without due process of law, and denied appellant the equal protection of the laws, and unlawfully abridged privileges and immunities of citizens of the United States to discharge contracts which were valid when and where they were made, in violation of Section 1, Article 14, of the Amendments of the Constitution of the United States, and said ruling was also in violation of Section 10, Article 1, of the Constitution of the United States, prohibiting the enforcement of laws impairing the obligations of contracts.

SECOND.

" The Court of Civil Appeals erred in overruling and refusing to sustain the original assignment of error num-

ber two of said appellant Insurance Company, to the effect that the court erred in rendering judgment for plaintiff for any amount, because the evidence shows conclusively that the insurance policies were transferred to J. H. Hilsman by valid transfers delivered and consummated in the State of Georgia; that under the laws of Georgia such transfers were valid contracts, and that plaintiff has no interest in said policies.

Said ruling deprived said appellant Insurance Company of rights, privileges and property without due process of law, and denied appellant the equal protection of the laws, and unlawfully abridged privileges and immunities of citizens of the United States to make contracts which are valid when and where they are made, in violation of Section 1, Article 14, of the Amendments of the Constitution of the United States, prohibiting the enforcement of laws impairing the obligation of contracts.

THIRD.

"The Court of Civil Appeals erred in overruling and refusing to sustain the original assignment of error number five of appellant, Manhattan Life Insurance Company of New York, to the effect that the court erred in rendering judgment for plaintiff for statutory damages and for attorney's fees, because the Texas statute, Revised Statutes, Article 3071, as construed in this case, is in conflict with and in violation of Section 1, Article 14, of the Amendments of the Constitution of the United States, providing that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

FOURTH.

"The Court of Civil Appeals erred in overruling and refusing to sustain the original assignment of error number seven of appellant Insurance Company to the effect that the court erred in failing and refusing to allow credit for the $460 paid by J. H. Hilsman to the insured, and interest thereon from date of such payment, and the judgment of the court is excessive.

Said ruling deprived appellant Insurance Company of rights, privileges and property without due process of law, and denied appellant the equal protection of the laws, and unlawfully abridged privileges and immunities of citizens of the United States, in violation of Section 1, Article 14, of the Amendments of the Constitution of the United States.

FIFTH.

"The Court of Civil Appeals erred in deciding against the titles, rights, privileges and immunities specially set up and claimed by said Insurance Company under the Constitution and Statutes of the United States.

SIXTH.

"The Court of Civil Appeals erred in affirming the judgment of the District Court, because plaintiff alleged and proved no valid cause of action against said Insurance Company" (P. R. pp. 73-75).

Under the rule by which this Court may notice a plain error not assigned or specified, we may hereafter call attention to some errors of a plain and fundamental character which perhaps were not assigned with absolutely complete plainness and accuracy in the assignments of error found in the record and heretofore quoted.

ARGUMENT.

First Ground of Error.

(a) A party has the right, by proper procedure, to pro-

tect himself against illegal or excessive demands, or double liability; and a State statute, when it is so construed and applied as to penalize the proper exercise of this right, is repugnant to the Fourteenth Amendment.

(b) The Texas statute, Revised Statutes (1905), Article 3071, as construed and applied by the State courts in this case, is wanting in due process of law, and repugnant to the Fourteenth Amendment.

(c) The Federal question presented by the foregoing propositions has not been foreclosed against plaintiff in error by any previous decision of this court construing said Texas statute; and said Federal question is properly before this court for review.

In discussing the foregoing propositions, we will first observe that said Federal question was raised in the Insurance Company's motion for a new trial in the District Court (P. R. p. 20); in its fifth assignment of error in the Court of Civil Appeals (P. R. pp. 22,23); in its tenth assignment of error in its motion for rehearing in the said Court of Civil Appeals (P. R. p. 51); in its tenth assignment of error in its petition to the Supreme Court of Texas for a writ of error (P. R. pp. 58, 59); and in its third assignment of error on writ of error from this court (P. R. p. 74).

This Federal question having been thus presented in a plain and specific manner, in all the courts, and at every proper opportunity, the question whether or not this particular claim of Federal right was presented in a proper and timely manner does not arise.

We will next observe that there have been many cases involving the exercise by this court of appellate jurisdiction over various Texas courts; and it is settled that as in this case the Supreme Court of Texas denied the Insurance Company's application for a writ of error, the writ of

error from the United States Supreme Court is properly directed to the Court of Civil Appeals. Stanley v. Schwalby, 162 U. S. 255; Bacon v. Texas, 163 U. S. 216. It is therefore unnecessary to cite additional cases on this point, which is not in actual controversy.

This brings us to the substantial and controverted question whether or not the State statute heretofore quoted, as construed and applied by the State courts in this case, is wanting in due process of law and repugnant to the Fourteenth Amendment of the Constitution of the United States.

On a previous day of this term defendant in error filed a motion to affirm on the alleged ground that this Federal question had been foreclosed against plaintiff in error by previous decisions of this court. The motion to affirm was submitted on briefs for both parties, and overruled by this court. However the question thus passed upon is so intimately blended with the further question whether or not the decision of the State courts in fact operated as a denial of a Federal right, that we will not attempt to separate these blended questions, and to some extent we will again present our argument submitted in opposition to the motion to affirm.

We are aware of the fact that in previous cases, and under the particular facts of these cases, and under the particular construction then given by the Texas courts to the statute under consideration, that statute was sustained by this Court. Fidelity Mutual Life Insurance Company v. Mettler, 185 U. S. 308; Iowa Life Insurance Company v. Lewis, 187 U. S. 264; and under like circumstances, and under a like construction, a somewhat similar statute was sustained in Farmers' & Merchants' Insurance Company v. Dobney, 188 U. S. 301.

These are the cases that on said former motion to af-

firm were relied on by defendant in error to sustain their contention that the Federal question now under discussion has been foreclosed against us.

On the other hand, in G. C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150, and St. Louis etc. Ry. Co. v. Wynne, 224 U. S. 354, other penalty statutes, as construed and applied in these cases, were declared wanting in due process of law, and repugnant to the Fourteenth Amendment to the Constitution of the United States.

In undertaking to ascertain which of these lines of decisions more closely applies to the present case, we will first observe that we understand it to be the general rule that on writ or error to a State court, presenting the question whether or not a State statute violates a Federal right, this court will accept the construction placed upon the State statute by the State court of last resort in the particular case under review, and will then determine whether or not the statute, as thus construed, and as applied to the particular facts before the court, violates a Federal right. It may thus occur that this court will sustain a State statute, as construed one way, or as applied to one state of facts, while as construed a different way, or as applied to a different state of facts, the statute would be declared violative of a Federal rgiht. See St. Louis etc. Ry. Co. v. Wynne, 224 U. S. 354; Yazoo etc. Ry. Co. v. Jackson Vinegar Company, 226 U. S. 217; Collins v. Texas, 223 U. S. 288; Martin v. West, 224 U. S. 191.

In line with this well settled distinction we desire to call particular attention to the fact that in this case the Insurance Company has not at any time made any unqualified attack on the statute in question. On the authority of Southwestern Insurance Company v. Woods National Bank, 107 S. W. 114, 118, discussed **supra**, and decided by the same Court of Civil Appeals, the Insurance Company

first contended that the statute had no application to the facts of this case, when the Company, as is expressly admitted, was not denying liability, or seeking to contest or delay payment, but was merely seeking to avoid double liability (P. R. pp. 20, 22, 51, 58). That contention having been overruled in the District Court (P. R. p. 20), it was renewed in the Court of Civil Appeals; and in all the courts, by separate and distinct assignments of error, the Insurance Company specifically contended that the statute, "**as construed in this case,** is in conflict with and in violation of Section 1, Article 14, of the Amendments to the Constitution of the United States" (P. R. pp. 20, 22, 51, 58).

The Federal question was thus clearly and precisely presented, and, as thus presented, it has **never** arisen in any previous case in this court reviewing this Texas statute, because in the previous cases the Insurance Companies were held to have wrongfully denied liability. But we confidently submit that the Federal question now directly presented **was** decided, at least in principle, in reviewing an Arkansas statute in the recent case of St. Louis etc. Ry. Co. v. Wynne, 224 U. S. 354.

In the Wynne Case, **supra,** it appeared that a statute of Arkansas imposed a penalty and attorney's fees on railroad companies for failure promptly to pay claims for damages to live stock. Wynne presented a claim for $500 damages to live stock, which claim the railroad company refused to pay. Wynne then sued for $400 (being $100 less than his original demand), and recovered judgment for $400 and the statutory damages and attorney's fees. The judgment having been affirmed by the Supreme Court of Arkansas, the case was brought on writ of error to this court, which reversed the judgment. This court expressly declined to say whether or not the statute would be sustained if applied to a different state of facts, but declared that "confining

ourselves to what is necessary to a decision of the case in hand, we hold that the statute, as construed and applied by the State courts, is wanting in due process of law, and repugnant to the Fourteenth Amendment of the Constitution of the United States."

In the Wynne case this court thus sustained precisely the same contention that the Insurance Company is making in the present case,—not that the statute under review is violative of the Fourteenth Amendment in all cases and under all circumstances, but that as construed and applied by the State courts in the particular case now before this Court, the statute is wanting in due process of law, and violative of the Federal right specially set up and claimed by the Insurance Company in the State courts.

In the Wynne case this court pointed out that in another case the Supreme Court of Arkansas, construing another penalty statute, had held in principle to the contrary, just as in the present case we have pointed out that in another case the same Texas Court of Civil Appeals had held that the penalty statute now under consideration has no application to an insurance company that admits liability, but merely seeks to avoid double liability. Insurance Company v. Bank, 107 S. W. 114, 119, discussed **supra.** But in this court, in determining whether or not a Federal right has been violated, while reference may be made to other cases illustrating the versatility of some of the State courts, the question will be decided here on the construction placed by the State courts on the State statutes in the particular case under review, just as was done in the Wynne case.

In the Wynne case the statute was held violative of Federal right on the ground that the railroad rightfully refused payment of an excessive demand; and we understand the principle of the Wynne case to be that a litigant

can not be penalized by a State statute for exercising a clear right to avoid payment of an excessive or improper demand, without violating a Federal right, whatever might be held where the litigant had wrongfully resisted a wholly rightful demand, a question not then before this court, and a question which for that reason this court expressly declined to decide in the Wynne case.

When the facts are analyzed it seems plain that the argument against the Texas statute, as construed and applied by the State courts in the present case, is in all respects as strong, and in some respects even stronger, than the argument against the Arkansas statute that in the Wynne Case this court held sufficient to condemn such statute as construed by the State courts in that case.

In the Wynne case the railroad company appears to have denied liability for any amount; at least it does not appear that the railroad company ever admitted liability for any amount. It was therefore to some extent, in the attitude of wrongfully resisting a rightful demand,—assuming that the facts showing liability for the damage were properly found against it. It may not unreasonably be supposed that if the railroad had admitted liability for the amount for which it had been sued, and had tendered payment of such amount, the tender would have been accepted in full of all demands, and the question of penalties and attorney's fees would thus not have arisen. But this court declined to enter into any such speculations. The Arkansas statute, like the Texas statute, made no provision for a tender after suit brought, and merely because before suit the plaintiff had made a demand for more than he sued for and recovered, and the penalty was based on the failure to comply with such excessive previous demand, this court condemned the statute as wanting in due process of law.

On the other hand, in the present case the Insurance

Company admitted liability from the beginning for the full amount of the demands against it, and offered to pay such demands promptly on the sole condition that it be protected against double liability. The situation which presented the double demand was not in any respect of the Insurance Company's making, or under its control. It had committed no wrong of either commission or omission, nor was it even remotely a party to a such wrong committed by another. The situation was caused by the act of Cohen, deceased, in assigning his policy to Hilsman; and Cohen, executor, stands in the shoes of Cohen, deceased, claiming and recovering statutory penalties and attorney's fees against the Insurance Company for the direct consequences of an act of Cohen, deceased, with which the Insurance Company had no connection whatever,—at least no voluntary or wrongful connection. Not only this, but vicarious punishment is visited on the Insurance Company, and Cohen, executor, is rewarded with unearned wealth, not only for an act of Cohen, deceased, held to have been illegal, but solely on the ground that it was illegal. Is this in accordance with due process of law? Of course, unless the act of Cohen, deceased, in assigning the policies to Hilsman, was illegal—a question we will discuss hereafter—Cohen, executor, not only had no cause of action for penalties and attorney's fees, but he had no cause of action of any kind.

It is of course elementary that a mere stakeholder of a fund against which conflicting claims are asserted has a right to have the conflict determined before he can be rightfully compelled to pay to either claimant. This is certainly true when the stakeholder, as in the present case, was rightfully in possession of the fund when the conflicting claims arose, and when the stakeholder was neither a party to the controversy nor in any way responsible for its

existence. Not only this, but the courts of Texas have held, in accordance with the general rule of equity on the subject, not only that such stakeholder can not be penalized because of his innocent connection with a dispute to which he is not a party, but that instead of paying attorney's fees to the successful claimant, he is entitled to his own necessary costs and attorney's fees out of the fund as a credit against the successful claimant. Bolin v. St. Louis etc. Ry. Co. 61 S. W. 444.

It is not only the right of a party to protect himself against illegal demands or double liability, but this court has held directly in the Wynne Case that it is a Federal right, and that to penalize its exercise under the assumed authority of a State statute is repugnant to the Fourteenth Amendment. The artificial difficulties interposed in this case to the prompt and certain enforcement of this right by a bill of interpleader, when such difficulties are attributed solely to Cohen, deceased, and to Cohen, executor, and which made it imperatively necessary for the Insurance Company to take the course it did take in this case, merely serve to emphasize the injustice and fundamental illegality, from the standpoint of due process of law, of the penalties imposed on the Insurance Company by the judgment of the State court. In this case, and for the purpose of reviewing the Federal question now under consideration, it would be wholly irrelevant to inquire whether or not the courts of Texas are correct in holding in Washington Life v. Gooding, 49 S. W. 123, discussed **supra,** that substituted service beyond the State is insufficient in a suit to determine conflicting claims to the proceeds of a life insurance policy. It should be sufficient, for present purposes, merely that the courts of Texas have so held, especially when the record shows that plaintiff below expressly admits the soundness of the decision in the Gooding case, and dismissed

his original suit against Hilsman for the reason, as the judgment recites, "that he is a non-resident of the State of Texas, and no jurisdiction had been or could be acquired over him" (P. R. p. 17). The laws of a State are not isolated and independent entities. The statutes of Texas and the decisions of her courts affecting the rights and remedies of the Insurance Company constituted a single collective unit with which it was compelled to deal. The Insurance Company, as a mere stakeholder, was under no sort of obligation to litigate any question whatever for the benefit of either of the rival claimants. Much less was it under obligation for any such purpose to assume the risk and burden of securing a reversal of the settled doctrine of the Texas courts, whether such doctrine was for any reason, Federal or non-Federal, sound or unsound. At least Cohen, executor, is in no position to defend his recovery of penalties against the Insurance Company because the Insurance Company accepted the rule in the Gooding case, which rule said Cohen, executor, solemnly affirms of record to be correct. Cohen, deceased, and Cohen, executor, are solely responsible for the situation in which the Insurance Company was placed. Cohen, deceased, for private purposes of his own, voluntarily transferred his insurance policies to a foreign jurisdiction, where they were held under claim of title. For the purpose of considering the particular question now under review, it is wholly immaterial whether such claim of title was valid or invalid. It is amply sufficient that Cohen, deceased, voluntarily invested Hilsman at least with the forms and muniments of title, that Hilsman asserted the validity of such title, and that the Insurance Company had no voluntary or wrongful connection with the situation. Cohen, executor, refused to submit to that foreign jurisdiction, although the Insurance Company offered to do so for the purpose of determining

the rights of the conflicting claimants, without even demanding that its costs and counsel fees be paid, a demand which it could have rightfully made, but which it waived. The Insurance Company then resorted to the only proper course of procedure remaining open. It paid the money to Hilsman, taking an indemnity bond in return, and when it was sued by Cohen, executor, it defended the suit. If it had paid Hilsman without taking an indemnity bond, under familiar and elementary principles such voluntary payment would have given it no recourse against Hilsman in case of subsequent recovery by Cohen, executor. On the other hand, having taken an indemnity bond from Hilsman, if it had refused to defend the Cohen suit, or permit Hilsman to defend the suit in his name, such refusal would have discharged Hilsman from liability on the indemnity bond, in case Cohen recovered. At least in such event the judgment in favor of Cohen would not have been admissible in evidence against Hilsman. This is one elementary proposition in the law of estopped with which the courts of Texas concur. Illies v. Fitzgerald, 11 Texas 429; Estay & Camp v. Luther, 142 S. W. 649. See also Ludy v. Larsen, 37 L. R. A. (N. S.) 907, opinion by Mr. Justice Pitney, now of this court. Therefore, in defending this suit, or permitting it to be defended—and it is absolutely immaterial which it was—the Insurance Company was plainly doing the only thing it could do legally in order to protect itself against double liability.

While we think that what we have said is plainly correct, it is not necessary to go that far in order to hold that the Federal question now under discussion was erroneously decided by the State courts. We regard the Wynne Case as definitely settling the correctness of the proposition that every party to a controversy has the right to resist excessive demands—and of course a threat of dou-

ble liability is an excessive demand; and when this right of just resistance is penalized by the construction placed by State courts upon a State statute, such statute, when thus construed and applied, is wanting in due process of law, and repugnant to the Fourteenth Amendment. When unjust demands are justly resisted it should make no difference whether the mode of resistance selected is the only mode or not. If it is a proper mode, that should be sufficient; and there can be no question that in paying Hilsman, and taking an indemnity bond, and then defending the Cohen suit, or permitting it to be defended, the Insurance Company pursued a proper mode of procedure for the protection of itself against illegal demands. The fact that under the decision of the Texas courts in the Gooding case, **supra**, this was the only proper mode of procedure open to it, merely adds unnecessary emphasis to the correctness of its position. As heretofore suggested, in the Wynne Case, the railroad company could have tendered the amount justly due, without prejudice to its actual rights; and if this tender had been accepted it would have suffered no penalty. On the other hand in the present case the Insurance Company was compelled to refuse Cohen's demand of payment, and to resist the Cohen suit, in order to preserve its rights. Therefore, if there is any distinction between the present case and the Wynne Case, that distinction is an additional reason for holding that the Federal question now under discussion was erroneously decided by the State courts.

While we are not asking this court to overrule or even qualify, any of its previous decisions on this question, we will again make brief reference to the cases heretofore relied upon by defendant in error in support of his claim that the judgment for penalties and attorney's fees was proper. In the Mettler Case (185 U. S. 308) there was a vigorous

dissenting opinion by Mr. Justice Harlan, in which Mr. Justice Brewer concurred. The Lewis Case (187 U. S. 204), so far as the question under consideration is concerned, is not distinguishable from the Mettler Case, and it was decided on the authority of that case; an din the Dobney Case (188 U. S. 301) Justices Harlan, Brewer and Brown dissented.

These are the cases relied upon by defendant in error, and none of them either discuss or decide the propositions upon which we rely.

On the other hand, in the more recent Wynne Case (224 U. S. 354), which does directly decide the propositions upon which we rely, the opinion of this court appears to have been unanimous.

It thus seems fair to suggest that in the cases relied upon by defendant in error this court went about as far as it is prepared to go in distinguishing the earlier Ellis Case (165 U. S. 150) and in sustaining penalty statutes, on special grounds of public policy, although under such statutes the parties are not placed upon an equal footing, and some of the greatest Justices of this court have therefore thought that these statutes did not give the parties the equal protection of the law, and that they were wanting in due process of law. But, however that may be, in this case it is not necessary to anticipate the future, and the reasoning and authority of the Wynne Case seems amply sufficient to reach a safe conclusion in deciding the precise question now presented. We may hereafter refer to some other matters bearing on this question, but as these matters are blended with questions not yet presented, we will first discuss these additional questions.

SECOND GROUND OF ERROR.

1. **The assignments of the insurance policies by Cohen**

to Hilsman were Georgia contracts, and all questions respecting the validity and obligation of said contracts should be determined by the law of Georgia.

2. Under the statutes of Georgia, and under the decisions of the Supreme Court of Georgia construing such statutes, said assignments were valid and vested in Hilsman the complete title to the policies, subject only to the loans thereon made by the Insurance Company.

3. Said Georgia statutes and decisions having been especially pleaded and proved by the Insurance Company in defense of this suit, the courts of Texas, in refusing to recognize the validity of said assignments, denied full faith and credit to the public acts of the State of Georgia, in violation of Article 4, Section 1, of the Constitution of the United States.

4. This court has the right to review and decide the questions raised by the above propositions.

We will discuss the above propositions substantially, though perhaps not precisely, in order of their statement.

FIRST—The record shows that the assignments of the policies were consummated by Cohen, in San Antonio, Texas, making a bank draft on Hilsman, in Atlanta, Georgia, for the agreed price of the policies, with assignments of the policies attached to the draft, the assignments not taking effect until they were delivered to Hilsman, in Atlanta, Georgia, when he paid the draft. Hilsman resided in Georgia, the contracts were delivered in Georgia, and these contracts did not contemplate any further act of performance or part performance in Texas (P. R. pp. 11-14, 27-28).

The recent case of Northwestern Life Insurance Company v. McCue, 223 U. S. 234, contains such a complete discussion of the subject that in this court we do not deem it necessary to cite any additional authorities in support

of our proposition that the assignments were Georgia contracts, and that all questions respecting the validity and obligation of said contracts should be determined by the law of Georgia.

It is true that the Texas Court of Civil Appeals held under the undisputed facts above stated "that the assignment of the politicies here involved was made in Texas * * * * and that the liability of the Insurance Company on the policies is determinable by the laws of this state (Texas) and not of Georgia" (P. R. p. 44). But while it may be true that this question, if considered independently, is not strictly a Federal question, and while it is difficult to frame a clear and general rule, applicable to all cases, defining the scope of review of this court on writ of error to a State court—a question we will discuss later—it is well settled by authorities we will hereafter cite that this court is never bound by the decision of a State court on a non-Federal question when the correct decision of a Federal question properly before this court for review depends in whole or in part on such non-Federal question. For the present we merely call attention to the direct conflict between the opinion of this court in the McCue Case and the opinion of the Court of Civil Appeals in this case on the question now under consideration, and we may later discuss more at length the consequences of that conflict.

The Court of Civil Appeals places its decision that the assignments were Texas contracts on the extraordinary propositions that the executory agreement was made in Texas, that "neither the payment of the purchase price of the policies, or their delivery to Hilsman, was necessary to pass title," and that therefore the contract was "consummated in Texas" (P. R. p. 45). An examination of the authorities cited under these propositions shows that they do not support them in the slightest degree. The

Court of Civil Appeals declares both the executory and executed agreements void because contrary to public policy—or rather, to be exact, the "distinctive policy of the forum," as the Court of Civil Appeals calls it (P. R. p. 44). How can a void executory contract "pass the title?" And if the executory contract was "sufficient to pass the title," then why did it not "pass?" Can an executory contract, whether it be valid or void, be properly called a "consummated transaction" sufficient to "pass the title" when by its express terms the parties have stipulated to the contrary? (P. R. pp. 26-28). Can the executory contract be held valid for the purpose of avoiding the executed contract, and denying full faith and credit to the statutes of of Georgia, and in the same breath also held void for the purpose of vindicating the "distinctive policy of the forum?" We ask these questions not because we think that they need any answer, but merely to illustrate the extraordinary versatility, and instant capacity to meet all emergencies, of the "distinctive policy of the forum" where this suit was tried.

SECOND—In defense of this suit the Insurance Company specially pleaded that the assignments of the policies were Georgia contracts, valid by the laws of that State (P. R. pp. 9, 10). In support of that plea the Insurance Company introduced in evidence the following sections of the Civil Code of Georgia of 1895:

"Section 2114. An insurance upon life is a contract by which the insurer, for a stipulated sum, engages to pay a certain amount of money if another dies within the time limited by the policy. The life may be that of the assured, or of any other in whose continuance the assured has an interest.

Section 2116. The assured may direct the money to be paid to his personal representative, or to his widow, or

to his children, OR TO HIS ASSIGNEE; and upon such direction, given and assented to by the insurer, no other person can defeat the same. BUT THE ASSIGNMENT IS GOOD WITHOUT SUCH CONSENT."

Section 3077. ALL CHOSES IN ACTION UPON CONTRACT MAY BE ASSIGNED so as to vest the title in the assignee, but he takes it, except negotiable securities, subject to the equities existing between the assignor and debtor at the time of the assignment, and until notice of the assignment is given to the person liable" (P. R. p. 32).

The Insurance Company also introduced in evidence various decisions of the Supreme Court of Georgia construing said statutes (P. R. pp. 30-32). We do not deem it necessary to quote these decisions here, and we merely refer to the record where they may be found, because it is admitted by the opinion of the Court of Civil Appeals (subject to a hypothetical qualification that we will presently notice), that if the assignments of the policies were Georgia contracts they were valid by the laws of that State (P. R. p. 42), and this is too plain for serious argument.

It is true that the opinion of the Court of Civil Appeals declares that "even if the assignment of the policies had been made in Georgia (which, as we have seen, was the fact), and it should be held valid by the laws of that State, it may be doubted whether on account of its being contrary to the distinctive policy of the forum in which this suit was brought, such law would be given effect by the courts of Texas" (P. R. p. 44). But whatever the Court of Civil Appeals may conceive to be the "distinctive policy of that forum"—and we are forced to admit, whatever else may be said of it, that such "policy" appears to be at least "distinctive"—and without attempting to define precisely how far the "distinctive policy of the forum" may go in over-

riding property rights without invading Federal rights, it is sufficient for present purposes to say that at least in the view of this court the "distinctive policy of the forum" must stop on the hither side of denying full faith and credit to the statutes and other public acts of a sister State, as required by Article 4, Section 1, of the Constitution of the United States. Cases fully illustrating this limitation will be cited in a subsequent connection.

It is also true that in the opinion of the Court of Civil Appeals the general admission that under the statutes of Georgia the assignments of the policies were valid (P. R. p. 42) is subsequently sought to be qualified by the suggestion that "it is doubtful whether in view of the disparity between the amount paid by Hilsman for the policies and the amount due and collected on the policies by him—the amount paid being only $460 and the sum collected by him being $5,750, an excess of $5,290—whether the courts of Georgia would not hold the contract of assignment a wagering or speculative contract between the insured and the assignee, who had no insurable interest in the former's life" (P. R. p. 44).

But however much we may admire the fertility of resources displayed by the above quotation it is deemed sufficient to say that it has no foundation whatever in the record. Cohen had already borrowed the full loan value of the policies, amounting to $1,750, and what he received from Hilsman was in addition to these loans. There is absolutely nothing in the record to suggest even a suspicion that the price paid by Hilsman was inadequate, tested, as should be done, by the facts as they existed when the assignments were made. Much less is there anything approaching the dignity of evidence to support the ingenious speculations of the Court of Civil Appeals above quoted.

In the recent case of Grigsby v. Russell, 222 U. S. 149,

this question was fully reviewed by this court; and it was held that the holder of a policy of insurance on his own life may make a valid assignment of the policy to a person having no insurable interest in the life of the insured; and the suggestion that the small price paid for the policy made it a wagering contract was summarily dismissed by this court as having no substantial foundation. This recent case is so directly in point that we do not deem it necessary to cite any additional authorities on this subject.

But even if the assignments did constitute a "speculative transaction" condemned by the "distinctive policy of the forum," what would be the result, as such "distinctive policy" has been authoritatively declared by the Supreme Court of Texas?

In Beer v. Landman, 88 Tex. 450, it was held by the Supreme Court of Texas that a transfer of securities, sufficient in legal form, passed the legal title, although it was a gambling transaction; and that "where two parties guilty of participation in an unlawful transaction are **in pari delictu**, neither a court of law nor of equity will aid either party to recover or to reinvest himself with any title or interest which he, in consideration of such unlawful contract, has vested in the other, but will leave them in the same condition as to vested interests that they by their own acts have placed themselves."

To meet this well settled rule the Court of Civil Appeals declares that "the principle that a court will not enforce an illegal contract, is applied between the parties to that contract only" (P. R. p. 45). And it is then argued that as this is a suit between Cohen and the Insurance Company instead of between Cohen and Hilsman the principle does not apply. Of course there is a class of cases where a difference of parties calls for a difference in the rules of

law applicable. The most familiar illustration is the case of a conveyance in fraud of creditors, which will generally be sustained between the parties, and set aside on behalf of creditors. This is because the law will not let the innocent suffer for the acts of the guilty, if such a consequence can be avoided. But this principle, which is the foundation of the rule that the Court of Civil Appeals seeks to invoke, instead of sustaining the judgment of that court, unequivocally condemns it, because here the innocent Insurance Company is made to suffer for what is held to be the guilty act of Cohen, and Cohen's estate gets a liberal bounty for his act that the Court of Civil Appeals calls "wicked." But why does not the Court of Civil Appeals **decide** the way it **reasons**? If the mere fact that this is a suit between Cohen and the Insurance Company is sufficient to avoid the consequences of illegality, why is it not sufficient to prevent the assignments from being held void on the ground of illegality? And again, the Court of Civil Appeals seems to have forgotten what it had held in an earlier portion of its opinion to meet another emergency. The court there says that the "Insurance Company * * * * must be regarded as standing in his (Hilsman's) shoes. * * * * If he (Hilsman) could successfully defend it (this suit), the Company can; if not, the Company cannot" (P. R. p. 43). If this is so what becomes of the distinction on account of difference of parties that the court subsequently attempts to draw?

The assignments of the policies were either legal or illegal. If legal, Cohen was legally divested of all interest. If illegal, the principle stated in Beer v. Landman, **supra**, puts him out of court. In neither event did plaintiff have any cause of action at law or in equity. We shall proceed on the correct assumption that under the statutes of Georgia the assignments were legal.

THIRD—We respectfully submit that we have already shown that the assignments of the policies were Georgia contracts, valid by the statutes of that State, which statutes were fully and specially pleaded and proved by the Insurance Company in defense of this suit, and this defense was fully considered by the Court of Civil Appeals and overruled by that court, as shown by its opinion. All this being true, it follows that the Court of Civil Appeals denied a claim of Federal right, thus presenting a Federal question which this court may review, even if the jurisdiction of this court depended on such question, which it does not, and although in the State courts this claim of Federal right was not so designated specifically. There are many cases holding that the claims of Federal right asserted in this court were not sufficiently set up and claimed in the State courts. But these were cases where the record failed to disclose that the Federal questions were **actually** or **necessarily** decided by the State courts. The object of the statute in requiring the Federal right to be "specially set up and claimed" in the State court is to advise that court of such claim, and first to give the State court a fair opportunity to consider and decide the question. But an objection to the technical sufficiency of the claim becomes important only when the record fails to show affirmatively either that the claim was in fact considered or that it was necessarily decided by the State court. Actual knowledge is at least equivalent to notice, and when the record affirmatively shows that the purpose of the statute has in fact been subserved, that is sufficient. As we are admonished in advance by the brief heretofore filed by counsel for defendant in error, on his motion to affirm, heretofore overruled, that the views above presented will be earnestly controverted, we will present some authorities on this subject.

In Atchison, T. & S. F. Ry. Co. v. Sowers, 213 U. S. 55, in error to a Texas Court of Civil Appeals, the defendant railway company specially pleaded a statute of New Mexico in defense of the suit, and this defense was overruled, although it does not appear that in presenting the defense any mention of the Constitution of the United States was made. In sustaining its jurisdiction this court said: "The opinion of the Court of Civil Appeals of Texas shows that the validity of this statute and its binding force to control the right of action asserted was considered and denied in giving judgment against the plaintiff in error. Such judgment gives this court jurisdiction of the case."

In El Paso, Etc., Ry. Co. v. Gutierrez, 215 U. S. 87, which also came here on writ of error to a Texas Court of Civil Appeals, it was contended by plaintiff in error in this court (and contended here for the first time in specific terms), that the State court had denied full faith and credit to a statute of New Mexico, in violation of Article 4, Section 1, of the Constitution of the United States. It was contended by defendant in error in that case, as shown by the brief of counsel, that this Federal question had not been properly raised in or actually decided by the State courts, and that it was not material to a decision of the case; and an examination of the opinion of the State court (117 S. W. 426, 102 Tex. 378) shows that this question was not in fact mentioned. In this state of the record this court said: "The District Court sustained the demurrer to the plea setting up this Act, and thereby denied the rights specially set up under that statute, the Supreme Court overruled the Court of Civil Appeals and affirmed the judgment of the District Court. It thereby **necessarily adjudicated** the defense claimed under the territorial Act against the railway company. If this de-

fense sets up a Federal right within the meaning of Section 709 of the Revised Statutes of the United States * * * * then we have jurisdiction of the case." The jurisdiction was accordingly sustained.

In Furman v. Nichol, 8 Wall. (75 U. S.) 44, in error to the Supreme Court of Tennessee, it was contended in this court by plaintiff in error that a statute of Tennessee impaired the obligation of a contract, while defendant in error earnestly and in various ways contended that this claim of Federal right had not been properly presented in the State court; and it appears that no claim of Federal right, specifically as such, was in fact made. In passing on this question the opinion of this court says: "It is enough for the purposes of this suit to say, that a cause can be moved from a State court to this court under the 25th section of the Judiciary Act of 1789, whenever relied on by the party who brings the cause here, and when the right he claimed it gave him was denied him by the State court. It is urged that the particular provision of the Constitution, which the plaintiffs in error say has been violated in its application to their case, should be contained in the pleadings, but this is in no case necessary. If the record shows, either by express averment, **or by clear and necessary intendment,** that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach, without applying it to the case in hand, then the jurisdiction of this court attaches. And it need not appear that the State court erred in its judgment. **It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiffs in error, and that the court was induced by it to make the judgment which it did.** Testing the case at bar by these rules, it is apparent that it is properly here, and must be

disposed of on its merits." This court then proceeded to consider the case on the merits, and reversed the judgment of the State court.

In Tilt v. Kelsey, 207 U. S. 43, in error to a New York Surrogate's court, this court said: "The proceedings before the surrogate are some what fully set forth, because it is contended that no Federal question was properly and seasonable raised in the State courts. We think, however, that a right under the Constitution of the United State was properly set up and claimed by the executors, as required by paragraph 709 of the Revised Statutes (U. S. Comp. State. 1901, p. 575), and denied by the highest court of the State, and that therefore we have authority to re-examine the decision. It appears clearly in the paper entitled 'Appeal to the Surrogate' that the executors relied upon the judicial proceedings in New Jersey as a defense to the assessment of the New York tax. They 'specially set up and claimed' a right under those proceedings, **though it was not in terms stated to be a right claimed under the Constitution.** This, in the case of a judgment of the court of another State, has been held to be a sufficient compliance with the statute." While the opinion proceeds to show that at a subsequent stage of the proceedings the Federal question was specifically raised, it is clear that this was not held to be necessary in order to support the jurisdiction of this court.

The early case of Wilson v. Black Bird Creek Marsh Company, 2 Pet. 245, on writ of error to a State court, presented a Federal question that had not been in terms raised in the State court. In sustaining the jurisdiction of this court, Chief Justice Marshall, after citing several earlier cases, says: "They establish, as far as precedents can establish anything, that it is not necessary to state in

terms on the record that the Constitution or law of the United States was drawn in question. It is sufficient to bring a case within the provisions of the 25th section of the Judiciary Act, if the record shows that the Constitution or a law or treaty of the United States must have been misconstrued, or the decision could not be made."

(We will here digress for a moment to observe that in the above quotation the great Chief Justice for once seems to have lapsed into inaccuracy of expression, as it is, and then was, well settled that in order to confer jurisdiction on this court it is not necessary that the Federal question should have been improperly decided by the State court.)

We could cite other cases to the same general effect, but this seems to be unnecessary. The statutes of Georgia were clearly and fully pleaded and proved by the Insurance Company in defense of this suit. This defense was not only necessarily involved, but it was actually considered by the State court; and in giving judgment against the Insurance Company the State court both necessarily and actually denied to these statutes of Georgia the force and effect that the Insurance Company claimed for them. A claim of Federal right was thus specifically set up by the Insurance Company, and unequivocally denied by the State court. This was sufficient to confer jurisdiction on this court, although there may have been a failure in the State court to label the proceedings accurately.

FOURTH—As reference has been made, and may be further made in this brief, to questions that, considered independently, are not Federal questions, and while it seems to be the general rule that on writ of error to a State court, this court will confine its review to the Federal questions arising on the record, yet there are exceptions to, or at least qualifications of this rule as well settled as the rule itself.

Thus on writ of error to a State court this court will review questions of local or general law, when the correct decision of Federal questions depends in whole or in part on such non-Federal question. In the Dartmouth College Case (4 Wheat 518) which came here on writ of error to a State court, on the Federal question whether or not a State statute impaired the obligation of a contract, it was held that this court had the right to determine for itself the preliminary non-Federal question whether or not a contract existed. The same proposition was again decided in Bridge Proprietors v. Hoboken L. & I. Company, 68 U. S. 116, 145, Clark v. San Francisco, 124 U. S. 639, and Attorney General v. Lowrey, 199 U. S. 639.

The case of Atlantic Coast Line Ry. Co. v. Wharton, 207 U. S. 328, came here on writ of error to a State court, the jurisdiction depending on a Federal question arising out of the commerce clause of the Constitution, and this Federal question itself depending on a strictly local question that had been decided by the State court against plaintiff in error, thereby, as was contended, eliminating the Federal question This court first reversed the State court on the local question, and then reversed the entire case on the Federal question. Of course unless this court had the power to decide all matters incidental to the exercise of its jurisdiction, such jurisdiction could often if not always be evaded.

Again, and for like reasons, even when the State court places its decision on a non-Federal ground, not directly connected with any Federal question presented for review, and broad enough to support the judgment, in a proper case this court will examine such non-Federal question to determine whether or not its decision by the State court rested on any real or substantial foundation, or whether it was not rather an arbitrary exercise of judicial power. This

principle was recognized, though not applied, in Vandalia Ry. Co. v. Indiana, 207 U. S. 359, in which case this court declined to say that the decision by the State court of a non-Federal question indicated an intent to evade the Federal question, because such decision appeared to this court to have been placed on reasonable grounds. It is proper, though not necessary for the decision of this case, to bear this suggestion in mind, in view of what we have already said and may hereafter say of the grounds upon which this case was decided by the State court. Again, when it unmistakably appears that the State court erroneously decided a question of local or general law, this court may notice such error, without attributing any improper motive to the State court. Thus in G. C. & S. F. Ry. Co. v. Dennis, 224 U. S. 503, which came here on a writ of error to an inferior Texas court, the jurisdiction of this court depending solely on the Federal question whether or not a State statute was repugnant to the Fourteenth Amendment, it appeared that while the case was pending in this court the Supreme Court of Texas, in another case, had held that the Statute was void because it was repugnant to the Constitution of Texas. Thereupon this court reversed and remanded the Dennis Case, without stopping to consider the Federal question, which was the sole ground of this court's jurisdiction.

FIFTH: But even if it should be held that the Federal question arising from the "full faith and credit" clause of the Constitution was not so presented in the State court at to confer jurisdiction on this court, nevertheless we submit that as this court has clearly acquired jurisdiction of the case through another Federal question that admittedly was raised in a proper and timely manner, this court has thereby acquired the jurisdiction at least to decide all Federal questions actually in the case, however inartificially they may be or may have been presented, and also the jur-

isdiction to decide all non-Federal questions incidental to the review of the Federal questions.

The 25th section of the Judiciary Act of 1789 in express terms confined this court's right of review, on writ of error to State courts, to Federal questions. And yet we have seen that while this statute, as originally framed, was in force, this court held in the Dartmouth College Case that on writ of error to a State court the right of review extended to non-Federal questions that were incidental to the Federal questions. The Act of Congress approved February 5, 1867 (14 Stat. at Large, 386, Chap. 28) in amending the original 25th section of the Judiciary Act, repealed, or at least omitted, the limitation on the right of review contained in the original statute, and the statute as thus amended now constitutes section 709 of the Revised Statutes. And so far as the terms of the statute are concerned, on writ of error to a State court this court seems to have the same right of review as on writ of error to an inferior Federal court.

The Act of 1867 was for the first time carefully considered by this court in Murdock v. Mayor and Aldermen of Memphis, 20 Wall. (87 U. S.) 590. The questions arising on the construction of the Act were argued by distinguished counsel. Mr. Justice Miller delivered the opinion of the court, Justices Clifford, Swayne and Bradley dissenting, and Chief Justice Waite not participating, the decision thus having been by a bare majority of this court.

The conclusion reached by the majority of the court was to the effect that the Act of 1867 did not extend this court's right of review, on writ of error to a State court, to all questions arising on the record, but that such general right of review was still confined to Federal questions; and the Murdock Case appears to be the general foundation for numerous subsequent decisions on this general sub-

ject. However, as we have already seen, both before and after the Act of 1867, and before and after the decision of the Murdock Case, this court has uniformly held, whenever the precise question was presented, that on writ of error to a State court this court has the right to review non-Federal questions incidental to the review of Federal questions, although the language of the court in the Murdock Case, if literally construed and applied, would seem to point to the opposite conclusion.

This illustrates the danger, often pointed out by this court, of attempting to give universal application to general language that is broader than the decision required. The statement of general rules for the guidance of all citizens is in practice one of the highest and most useful functions of this court; and not many have reached Justice Miller's distinction in this respect. But the clear statement of a rule, at once completely inclusive and exclusive, presents difficulties to the finite mind that are seldom if ever completely overcome. However, we may face the height though we never tread the summit.

With the utmost deference, therefore, we ask leave briefly to comment on the Murdock Case, without questioning its authority on what was in fact decided, and necessary to the decision, at least to the extent that such authority has been recognized by subsequent decisions of this court.

The majority opinion states that it was impossible to ascertain with any degree of satisfaction the motives that induced the passage of the amendatory Act of 1867. We think, however, that it is reasonably safe to say, in a general way, that the same character of motives that lead to the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments also lead to the enactment of the Act of 1867, as well as to the enactment of other legislation, some of

which has endured, and more of which has been either repealed or set aside by the courts. See Ex. parte Garland, 4 Wall. (71 U. S.) 333, for an historic illustration of this suggestion.

We think it is also safe to say that much of the language in Justice Miller's opinion was in just response to the extravagant construction of the Act of 1867 that was pressed upon this court for adoption, such construction, as Justice Miller says, leading to the **reductio ad absurdum** that "every case tried in the State court, from that of a justice of the peace to the highest court of the State, may be brought to this court for final decision on all the points involved in it."

We of course make no such contention. On the contrary we fully accept the obvious meaning of Justice Miller's language that it is "the more reasonable inference that Congress intended that the case should be brought here that those questions should be decided and finally decided by the court established by the Constitution of the Union, and the court which has always been supposed to be not only the most appropriate but the only proper tribunal for their final decision." The amendment made by the Act of 1867 certainly means something, and something substantial. Taking into consideration the change in the language of the law, and the well known general conditions that then existed, while it was not the purpose of the amendment to allow all cases and all questions to come before this court for review, we submit that at least it was its clear purpose to remove all merely verbal obstacles and objections to the complete and effective exercise, in cases properly before this court, of the jurisdiction finally to decide **all** questions in the case of a Federal character, and all other questions inseparably involved with such Federal questions, although some of these Federal

questions may not have been so raised in the State court as of themselves to confer jurisdiction on this court. It seems to us that this conclusion necessarily results from either a literal or any reasonable construction of the statute, and from a comparison of all the cases on the subject, although we have found no case where this broad proposition has been expressly decided by this court, and we believe that its decision is not necessary even in this case, because all Federal questions in this were in fact sufficiently raised in the State court.

On this branch of the case we therefore submit:

(1) The judgment of the State court both necessarily and actually denied full faith and credit to the statutes of Georgia, under which the assignments of the policies to Hilsman were valid.

(2) The Federal right thus denied was sufficiently set up and claimed in the State court, even if the jurisdiction of this court in any respect depended on such Federal question.

(3) In any event, this court having unquestionably acquired jurisdiction of the **case** because of **another** Federal question has the right to review at least all Federal questions in the case and all other questions inseparably connected with such Federal questions, although one of these Federal questions may not have been so presented in the State court as of itself to **confer** jurisdiction on this court.

THE RELATION OF THE OPINION OF THE COURT OF CIVIL APPEALS TO THE FEDERAL QUESTIONS IN THIS CASE.

We will conclude this brief with some observations on the above mentioned subject, having already to some extent discussed the general question as to how far this court may go in noticing non-Federal questions for

the purpose of determining whether or not Federal rights have been violated, or Federal questions evaded. We will now notice some of the most prominent features of the opinion of the Court of Civil Appeals in this case, in order to inquire whether or not there are any independent grounds in support of its judgment sufficient to warrant this court in declining to decide the Federal question arising from the "full faith and credit" clause of the Constitution.

(a) In its opinion of this case the Court of Civil Appeals says: "In this State (Texas) an assignment of such a policy to one without an insurable interest is regarded as valid only to the extent of reimbursing the assignee for amounts paid out by him with interest. If the assignee has paid out nothing for which he is in equity entitled to be reimbursed, the assignment is void; **but if he has, because of the benefit received by the beneficiary or the estate of the insured, the assignee is allowed such reimbursements,** and the balance of the insurance money goes to the estate or the beneficiary. The ground for holding the assignment void, **except for the purpose of reimbursing the assignee,** is that such transaction is **a mere gambling contract**, and that it is **against public policy** to create an interest in the early death of the insured on the part of one having no corresponding interest in his life, which is the case where the policy is assigned for an amount less than its value" (P. R. pp. 41, 42).

Without stopping to notice some minor inaccuracies, we admit that **as far as it goes** the above quotation is a substantially correct statement of the "Texas rule" on this subject. But why did the court refuse at least to give the Insurance Company the benefit of this rule, and deduct from the recovery the $460 that Hilsman had paid for the policies, and interest on this amount? The

Court of Civil Appeals answers this question as follows: "It seems from what has been said that, as the contract of assignment under which this money was paid was void for **two grounds** and, for that reason, conferred no right to or interest in the policies in the assignee, and the payment of the money to him was as though it had been made to a stranger. This can afford no defense to the action of the executor of the estate of the insured for the **entire amount** due on the policies" (P. R. p. 46).

The only "two grounds" mentioned by the Court of Civil Appeals as affecting the validity of the assignments—if they may be called "two grounds"—are (1) that such an assignment is "against public policy," and (2) that it is a "mere gambling contract." But, as we have seen, the Court of Civil Appeals had previously declared that notwithstanding the presence of these "two grounds" the assignee was entitled to reimbursement even under the "Texas rule." Again the conclusion of the Court of Civil Appeals is in plain and direct conflict even with its own premises.

(b) But the above quoted statement of the "Texas rule" is not complete. In a long and unbroken line of decisions the Supreme Court of Texas had held that while the assignee of a life insurance policy had no beneficial interest beyond the amounts paid by him, and interest, nevertheless that such assignee had the right to collect the full amount due on the policy, being accountable to the estate of the insured for the surplus beyond his payments and interest; that it was the plain duty of the Insurance Company to pay the assignee, and that such payment completely discharged it from liability. Schofield v. Turner, 75 Tex. 324; Cawthon v. Perry, 76 Tex. 338; Pacific Mutual Life Insurance Co. v. Williams, 79 Tex. 633; Cheeves v. Andres, 87 Tex. 287.

In Schofield v. Turner, 75 Tex. 324 (as in this case) the policy had been transferred to one having no insurable interest, except the consideration he had paid for the transfer. The court says, "Such holder of the certificate may no doubt collect the money for the use of the heirs, and enforce such proper claims of his own against the fund as the law recognizes."

In Pacific Mutual Life Insurance Company v. Williams, 79 Tex. 633, the Insurance Company sought a reversal of the judgment on the ground that Mrs. Williams, the payee in the policy, had no insurable interest in the life of the deceased.

On this point the court says: "The question thus raised is not one of ultimate right to the money to be recovered, but of the right of appellee to maintain this action; and it has been held in many cases under policies like that involved in this case that the person named by the assured and insurer in the policy as the person to whom the sum secured by the policy shall be paid may maintain an action on the policy without reference to the interest of such person in the life of the insured. Ins. Co. v. Baum, 29 Ind. Co. v. Rogan, 80 Ill. 39; Campbell v. Ins. Co., 98 Mass. 389; Fairchild v. Ins. Co., 51 Vt., 625; Forbes v. Ins. Co., 15 Gray 225."

"In Insurance Company v. Baum it was said: 'It is not for the Insurance Company, after executing such a contract and agreeing to the appointment so made, to question the right of such an appointee to maintain the action. If there should be a controversy as to the distribution among the heirs of the deceased of the sum so contracted to be paid, it does not concern the insurer. The appellant contracted with the insured to pay the appellee, and upon such payment being made it will be discharged from all

responsibility. So far as the insurance company is interested the contract is effective as an appointment of the appellee to receive the sum insured."

"The fact that Mrs. Williams may recover against the insurance company, and is entitled to do so, does not cut off an inquiry between her and the legal representatives or heirs of the insured as to whether she had an insurable interest."

"There is no error in the judgment and it will be affirmed."

The following extracts are taken from the opinion of the court in Cheeves v. Anders, 87 Tex. 287.

"Any man may insure his own life, making the policy payable to his legal representatives, and afterwards assign to any one, or he may procure such policy and make it payable to any person that he may name, but in either case, if the person to whom it is assigned, or who is named in the policy, has no insurable interest, he will hold the proceeds as a trustee for the benefit of those entitled by law to receive it."

"When an insurance company has issued a policy upon the life of a person to one who has no insurable interest in the life insured, or when a policy has been assigned to one having no such interest, the insurance company nevertheless must pay the full amount of the policy, if otherwise liable, because it has so contracted, and it is no concern of the insurer as to who gets the proceeds, except to see that it is paid to the proper parties under the agreement. It is simply required to perform its contract, and the law will dispose of the money according to the rights of the parties. Ins. Co. v. Williams, 79 Tex. 637, and authorities cited."

"It is held by the courts of this and other States, that when one secures a policy upon his own life and transfers

it to another who has no insurable interest, the want of insurable interest cannot be set up as a defense by the insurance company; the policy or the assignment is not void as to the insurance company, but will be enforced."

"It is generally held, that where one having an interest in the life of another obtains a policy upon such life, and the interest ceases before death, the person named in the contract as payee **or the assignee of such policy** may maintain suit against the insurance company. Ins. Co. v. Allen, 138 Mass. 24; Ins. Co. v. Schafer, 94 U. S. 457; McKee v. Ins. Co., 28 Mo. 383. These cases do not determine as to how the proceeds shall be distributed, and are not in conflict with the former decisions of this court."

We have thus quoted liberally from the opinions of the Supreme Court of Texas in order to show that the judgment in this case is in direct conflict with even the settled law of Texas; and that when the Insurance Company paid Hilsman, with or without an indemnity bond, it did what the Supreme Court of Texas had repeatedly declared to be its plain duty. There is no **opinion** of any Texas court, except the opinion of the Court of Civil Appeals in this case, that at all qualifies what we have quoted from the Texas cases. And we have shown, and will further show, not only that the opinion of the Court of Civil Appeals in this case is inconflict with all other Texas opinions, but that it is frequently in conflict even with itself, and with all known rules of reasoning from premises to conclusions.

But it may be said that the Supreme Court of Texas, in denying the Insurance Company's application for a writ of error, without a written opinion, approved the judgment of the Court of Civil Appeals. Technically yes. Actually that conclusion does not necessarily follow. Under the Texas practice an applicant to the Supreme Court for a writ of error is not permitted to make an oral argument, or even

to appear by counsel before the court. At least until quite recently applications for writs of error were disposed of in a summary and wholesale fashion that scarcely comported with the theory that each and all of them received mature consideration. According to reliable newspaper reports, fifty-seven applications were passed on at the sitting of the Supreme Court the day that the Insurance Company's application in this case was denied. We say this merely because it is a well known fact that tends to explain the situation, and not because we think the matter important in this case, because if we were dealing here with an opinion of the Supreme Court of Texas our rights in this court would be precisely what they now are.

(c) This brings us to perhaps the most interesting features of the opinion of the Court of Civil Appeals, from which we quote as follows:

"Here, as admitted by the defendant in the agreement upon which the case was tried, the Insurance Company knew when it paid Hilsman the face values of the policies that he claimed them as his own adversely to the estate of the insured; that as the owner, he claimed he was entitled to the entire amount, less the sums of the loans due the insurer, as his own property, independent of the claims of the executor of the estate of Jacob Cohen; and that when paid to him that he would hold the same as his own without recognition of the trust in favor of those who were equitably entitled to the benefit of such funds. In other words, with full knowledge of the claim of Cohen's executor to the amount due on the policies, and the ground upon which it was based, and that Hilsman denied the existence of the trust that equity charged him with, and of his entire repudiation of the same, and that he would appropriate the proceeds of the policy to his own exclusive ben-

efit, in violation of the right of the insured's executor therein, it paid the face value of the policies to him. **Thus aiding and abetting and enabling him to acquire possession of money which the law charged it with knowledge that the fund belonged to the insured's estate, well knowing that Hilsman would hold it against the rights of the real owner. THE COMPANY'S HANDS ARE NOT CLEAN, FOR THEY HAVE GIVEN TO ONE MONEY TO KEEP WHICH IT KNEW WAS NOT HIS, BUT ANOTHER'S. THERE ARE NO WATERS OR LOTIONS IN A COURT OF EQUITY WITH WHICH FOUL HANDS CAN BE CLEANSED"** (P. R. p. 43.)

"But here it is the contract of insurance, made between the Insurance Company and the insured, that is sought to be enforced by the latter's executor to which Hilsman was in no way a party. Had he sought to enforce it through the medium of the courts he would have been met by the inquiry, **'What right have you to the money due on these policies?' His only true answer would have been, 'I own them under an assignment from the beneficiary, which the law denounces as illegal and pronounces as void.' Then would the court say unto him: 'DEPART FROM ME, YE WICKED, I KNOW YOU NOT'"** (P. R. p. 46).

"The Company has indemnified itself against its act in paying the money due on the policy to one who was not entitled to receive it; **now let it resort to its indemnity.** The judgment is affirmed" (P. R. p. 47).

After a necessary pause to recover our breath, instead of making a vain attempt to discuss the above quotations, we will merely say, in a general way, that since reading Don Quixote we have always uncovered before every sub-

lime personification of inflated virtue, resolved at any cost to strike down all forms of iniquity. But in such a presence it is always prudent—when it is possible—to remain at a respectful distance, lest the valiant crusader chance to have more strength of arm than intelligence of aim. However, in this case the Insurance Company was not able to practice that prudence, and it has accordingly met the usual fate of the Innocent Bystander. It has met even a worse fate, because we understand that even in the happy land of feuds and moonshine—in whose refined atmosphere heroic rhapsodies spontaneously soar to their loftiest heights—it is always considered good form, when making **post mortem** remarks about the Innocent Bystander, to speak charitably of his past, and hopefully of his future. For example it would not be considered strictly conventional, when referring to the late Innocent Bystander, to exclaim that "there are no waters nor lotions with which foul hands can be cleansed," or to intimate that at the throne of judgment he was fated to hear the dread sentence: "Depart from me, ye wicked, I know you not." Such choice sentiments as these—perhaps not always so chastely expressed—are supposed to be reserved for such **ante mortem** exchanges of personal courtesies as may occur between the immediate parties to the actual **casus belli.**

That in this case the Insurance Company, without either fault or freedom of choice, occupied the position of the Innocent Bystander, is a proposition we discussed when considering the constitutionality, from the standpoint of due process of law, and as applied to this case, of the Texas penalty statute under which by the judgment of the Court of Civil Appeals the Insurance Company has not only been condemned in this world, but perhaps we may infer that in order to vindicate the "distinctive policy of the forum" it would also have been condemned for all eternity, ex-

cept for the providential circumstance that being a corporation it fortunately has no soul. However, to despoil and defame the innocent, to the end that the guilty—if guilt there be—may thus be both subsidized and canonized, on whatever celestial grounds peculiar to the "distinctive policy of the forum" such judgment may be defended, does not comport with any merely terrestrial conception of due process of law and the equal protection of the laws with which we are acquainted; much less can any such spoliation be properly justified on the amiable conjecture that the victim may in some way be able to recoup his losses.

Such are the grounds upon which the Court of Civil Appeals has pronounced its judgment on the undisputed facts of this case. We submit that these grounds are not only insufficient to evade the Federal questions presented by this record, but that they merely serve to emphasize the correctness of our proposition that these Federal questions were erroneously decided by the State court.

We respectfully pray that the judgment of the Court of Civil Appeals be reversed.

WILLIAM J. MORONEY,
Dallas, Texas,
Attorney for Plaintiff in Error.

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No. 160.

IN THE

Supreme Court of the United States,

October Term, 1913.

MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK, et al.,

Plaintiffs in Error,

vs.

DAVID COHEN, Independent Executor of the Estate of JACOB COHEN, Deceased,

Defendant in Error.

In Error to the Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

ARGUMENT BY PLAINTIFFS IN ERROR IN REPLY TO BRIEF OF DEFENDANT IN ERROR.

WILLIAM J. MORONEY,
Dallas, Texas,
Attorney for Plaintiffs in Error.

W. M. Warlick, Law P., 810½ Main St., Dallas, Phone M. 4981.

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ARGUMENT BY PLAINTIFFS IN ERROR IN REPLY TO BRIEF OF DEFENDANT IN ERROR.

In this argument it is not our purpose to repeat what we have already presented in our original brief, or even to reply at length to the brief of defendant in error, but we will supplement our original brief in some respects.

In said original brief we discussed St. Louis, etc., Ry. Co. vs. Wynne, 224 U. S. 354, in support of our proposition that the Texas penalty statute, as construed and applied by the State courts in this case is repugnant to the Fourteenth Amendment. The Wynne Case was recently followed by this Court in Chicago, etc., Ry. Co. vs. Polt, decided January 26, 1914,

and not yet officially reported. The opinion in the Polt Case clearly indicates that the principle of the Wynne Cace is not regarded as now seriously debatable in this Court. To paraphrase the language of the opinion in the Polt Case, "the rudiments of fair play required by the Fourteenth Amendment are wanting when defendant is required to guess rightly what a jury (or court) will find" in a controversy to which it is not a party, respecting the validity of a contract between third parties with which defendant has had no voluntary connection, when defendant has only hearsay information as to the facts, when the law is in serious dispute, when defendant offers to pay all it owes on the sole condition that it be protected against double liability, when the party claiming and recovering the penalty without any necessity or excuse rejects this offer, and when on final analysis the claim of right to penalize the innocent defendant rests on the alleged guilt of plaintiff, or plaintiff's ancestor.

While defendant in error seeks to distinguish this case from the Wynne Case, counsel appear to us to show more loyalty to their cause than faith in the result. This appears, among other things, from the earnest suggestion of counsel that in case of reversal this Court should reverse only a part of the judgment—a suggestion we will deal with later.

Defendant in error, brief pp. 2-3, contends that the case of Insurance Co. vs. Bank, 107 S. W. 114, discussed by us in our original brief, "has no application, for the reason that two claimants had filed suit, and the Insurance Company merely interpleaded them and offered to pay the money into court."

That is precisely what the Insurance Company did in this case, except that because the rival claimants resided in different jurisdictions, and refused to submit to a common jurisdiction, the Insurance Company was not able to interplead them. The Insurance Company being wholly without fault,

and the fault, if fault there was, being the fault of plaintiff's ancestor, in the first place, and plaintiff himself, in the second place, the distinction sought to be drawn by defendant in error thus merely emphasizes the complete absence in this case of "the rudiments of fair play required by the Fourteenth Amendment."

But while we referred to Insurance Company vs. Bank to illustrate the course of decisions in Texas, we of course did not cite that case as an authority on the Federal question we were discussing, and therefore it would be too much of a digression to give further attention to that case.

Defendant in error also seeks to distinguish the Wynne Case on the ground that the Insurance Company voluntarily "came into the State and wrote the policies in question with this law already on the statute books." If the Constitution of the United States ceased to be the supreme law of the land in Texas as to those who had the temerity to cross her boundaries, the suggestion of counsel would be entitled to consideration. Such, however, is not the situation.

But, as pointed out in our original brief, page 3, the insurance policies were not Texas contracts. They were New York contracts, and this case arose in Texas on a transitory cause of action merely because plaintiff succeeded in securing personal service of process on an agent of the Insurance Company in Texas.

We do not deem it necessary to say anything further on this branch of the case.

(2) Defendant in error contends that because the record stipulates that the assignment of the policies was a part of a "cotton futures" transaction the judgment should be affirmed, at least as to the principal and interest. We did not heretofore discuss this feature of the case because we did not understand that the case was decided by the State court on any such

ground, although we admit that the more we study the opinion of the State court the less we understand it.

Defendant in error, without citing any such statute, asserts that the assignment of the policies was in direct violation of the criminal law of Texas. The opinion of the Court of Civil Appeals (R. R. p. 45) cites "Acts Texas Legis. 1907, p. 132," but no such statute is found on page 132, Laws of 1907. Texas has various statutes penalizing various kinds of gaming, and prohibiting the open "bucket shop," but if there is any statute absolutely penalizing a private contract between individuals involving "cotton futures," we are not aware of the fact, and we are not alone in this respect, because quite recently two of the Texas Courts of Civil Appeals have held that the mere fact that a contract embraced a "cotton futures" transaction did not affect its validity. In Mackey Telegraph Cable Co. vs. Bain, 163 S. W. 98 (December 22, 1913), it was held that a "cotton futures" contract for "hedging" purposes was valid; and in Futch vs. Sawyer, 163 S. W. 397 (January 14, 1914), also a "cotton futures" case, it was held that "the mere knowledge that money was to be used by the borrower for an illegal purpose will not, without some act in furtherance thereof, defeat the lender's right to recover."

The stipulation in the record does not indicate that Hilsman did any act in furtherance of the alleged illegal purpose of Cohen, or whether such alleged act was for "hedging" purposes or not. As the presumption is always in favor of the validity of a contract, the stipulation is therefore insufficient to affect the validity of the contract even if the Texas law applies. But as the assignments were in fact Georgia contracts it is immaterial what the Texas law may be. It seems plain to us, however, that the Texas law was properly declared in Beer vs. Landman, 88 Tex. 450, discussed in our original brief, page 26.

This Court must of course deal with the record as it has been made. But if that record shows reversible error it is discretionary with this Court whether it will reverse and remand the case for further proceedings, or dispose finally of the case here. It is the general practice of appellate courts, so far as our experience shows, to reverse and remand for a new trial whenever reversible error is shown, and it also appears probable for any reason that the actual case has not been fully developed.

This case has not been fully developed. The "cotton futures" stipulation was signed by the writer, as attorney for the Insurance Company, without personal knowledge of the facts, and under a misapprehension as to the facts. Plaintiff's original petition alleged that the facts were substantially as stated in the stipulation, and we do not question the fact that this allegation was made in good faith by plaintiff's attorney, as it was then accepted in good faith by the Insurance Company's attorney, and agreed to in order to expedite the case.

The truth, however, is, as we are now fully and definitely advised by the complete correspondance between Cohen and Hilsman, that there is no foundation whatever in actual fact for the "cotton futures" stipulation, Printed Record, paragraph 8, page 28. Hilsman had no agent in San Antonio. He was not in the "cotton futures" business. The assignments of the policies had no connection whatever with any "cotton futures" transaction, as shown by the complete correspondance between Cohen, in San Antonio, Texas, and Hilsman, in Atlanta, Georgia. We do not know what Cohen did with the money he got from the Insurance Company and Hilsman, or whether he spent it in "cotton futures" or not.

The situation thus presented is unusual, but after careful reflection we deem it proper to make the above statement for several reasons:

First, the writer doubts the propriety of his further assuming the truth of an erroneous stipulation, which he inadvertantly signed, without at least mentioning the fact. By remaining silent the writer would perhaps not be subject to just censure for aiding in presenting a moot question to this Court, but he does not care to decide that matter for himself, and he hopes that he will not be thought chargeable with impropriety in merely seeking to avoid occasion for such a charge.

Second, the writer does not think that he should proceed further without doing what he can to correct any unjust reflection on Mr. Hilsman's character and conduct, for which the writer is in any degree responsible.

Third, while this statement *dehors* the record of course can not be considered as a ground for reversal, yet we believe it can be properly considered in support of our suggestion that in case of reversal on other grounds the whole case should be remanded for a new trial to the court of original jurisdiction, the district court of Harris County, Texas, which is the only court where the erroneous stipulation can be properly and definitely corrected, and much of the debated matter in this case thus eliminated.

We therefore submit (1) that the Texas penalty statute, as construed and applied by the State courts in this case, is repugnant to the Fourteenth Amendment, and therefore the judgment should be reversed; (2) that the assignments of the policies were Georgia contracts, and that this Court should so decide, in order that it may be determined that the Georgia statutes apply, and that under the full faith and credit clause of the Constitution they must be applied. If this case is to be remanded for a new trial, nothing else need now be decided, and it is not the practice of this Court to decide more than the occasion requires, or to decide questions that are not

likely to arise on a subsequent trial, and in case of a subsequent trial the statutes and decisions of Texas and Georgia supposed to effect "cotton futures" contracts will be eliminated from consideration when the record is corrected in accordance with the facts. The adoption of these views will also promote the full and complete administration of justice, which should be the object of all judicial proceedings.

WILLIAM J. MORONEY,
Dallas, Texas,
Attorney for Plaintiffs in Error.

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No. 160

IN THE

Supreme Court of the United States

October Term, 1913

MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK, AND UNITED STATES FIDELITY & GUARANTY COMPANY,

Plaintiffs in Error,

VS.

DAVID COHEN, INDEPENDENT EXECUTOR OF THE ESTATE OF JACOB COHEN, DECEASED,

Defendant in Error.

In Error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.

BRIEF OF DEFENDANT IN ERROR.

—By—

WILMER S. HUNT,
Attorney for Defendant in Error.

STERLING MYER,
C. A. TEAGLE,
Of Counsel.

GRAY, DILLARD & YOUNG, HOUSTON, TEXAS

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BRIEF OF DEFENDANT IN ERROR.

Statement of the Case.

In addition to the statement made by the plaintiff in error, we desire to call the court's attention to the following facts which have been ignored in the statement made:

First: The statement as made by plaintiff in error does not show that the assignment of the policies in question was made through Hilsman's agent, who resided in San

Antonio, Texas. By the agreed Statement of Facts, the following appears: "J. H. Hilsman resided in Atlanta, Georgia, and Hilsman had an agent in San Antonio, Texas, through whom the negotiations for the transaction were begun, and the transaction itself definitely agreed upon, the agreement being that Hilsman would pay Jacob Cohen $460.00 for his equity in said policies; whereupon Cohen wired Hilsman to send the papers, and the following correspondence by letter and telegram passed between them," etc. (See printed Record, p. 26, Sec. 7.) The assignments were prepared and acknowledged in San Antonio, Texas, by Cohen, and were delivered to the bank there for transmission to Hilsman. (Printed Record, top of p. 28.)

Second: The statement as prepared by plaintiff in error does not show that the parties agreed that this was a gaming transaction, or in pursuance of a transaction prohibited by the statutes of Texas, and made a criminal offense, and does not show that this question was raised in the State courts and was decided by the Court of Civil Appeals. Section 8, page 28, of the printed Record, shows that the parties agreed in the Statement of Facts that Cohen, Hilsman and his agent were engaged in dealing in cotton futures, and that the sale of the policies was a part of such transaction. This question was passed on by the Court of Civil Appeals in deciding this case, and that court held that the consideration for the attempted assignment was void in law, and vested no right in Hilsman to either the policies or the proceeds thereof. (Printed Record, p. 45.)

Third: In the statement of the case made by plaintiff in error, reference is made to the case of Insurance Com-

pany v. Bank, 107 S. W., 114, and while we think this should more properly come with the argument, yet we take occasion to say that said authority has no application, for the reason that two different claimants had filed suit, and the insurance company merely interpleaded them, and offered to pay the money into court.

Answer to the First Assignment of Error.

In answering the first assignment of error, on page 9 of the insurance company's brief, we wish first to call the court's attention to the fact that no such contention was made either in the trial court, in the Court of Civil Appeals, or in its petition for writ of error to the State Supreme Court, but for the first time presents said question in its brief filed herein, and on this point we respectfully submit the following propositions:

First Proposition.

The Supreme Court will not consider questions not raised and passed upon in the court below, nor will the raising of one Federal question in the State court permit the consideration of other Federal questions than the one raised.

Argument.

As we feel that this question is so well settled, we will refrain from an extended argument, but content ourselves with the citation of some of the authorities which have clearly settled this rule in harmony with the proposition as stated.

Authorities.

Wilson v. Namie, 102 U. S., 572 (26 L. Ed., 234).
Keokuk & H. B. Co. v. Ill., 175 U. S., 626 (44 L. Ed., 299).

Dewey v. Des Moines, 175 U. S., 193 (43 L. Ed., 665).
Messenger v. Mason, 10 Wall., 507 (19 L. Ed., 1028).
Maxwell v. Newbold, 18 How., 511 (15 L. Ed., 560).
Capitol City Dairy Co. v. Ohio, 183 U. S., 238.

An inspection of the Record will show that at no time during the whole proceeding in the State courts did the plaintiff in error contend that any statute or decision of the State of Texas was in conflict with any Federal statute or constitutional provision, except as to Article 3071 of the Revised Statutes, and even in its petition for writ of error to this court it fails to designate or point out any particular Federal statute or constitutional provision which conflicts with the results obtained in the case at bar. It is a well settled rule of this court that in a petition for writ of error on a claim that the decision of the State court is void because it is in violation "of various other provisions of the Constitution of the United States," that such ground is too indefinite to be considered, and, therefore, we contend that the only question in this case for the Supreme Court to pass on is as to the constitutionality of Article 3071 of the Texas statutes. In support of this position we cite:

Maxwell v. Newbold, 18 How., 511 (15 L. Ed., 560).
Messenger v. Mason, 10 Wall., 507 (19 L. Ed., 1028).
Clark v. McDade, 165 U. S., 170 (41 L. Ed., 673).
Hamblen v. Western Land Co., 147 U. S., 531 (37 L. Ed., 267).

The last two cited authorities also lay down the rule that the assignment regarding the Federal question must be specific, and that a vague and general statement that it was against the 14th Amendment, etc., will not raise a Federal question.

Answer to Second Assignment of Error.

(Pages 9 and 10 of Plaintiff in Error's Brief.)

Under this assignment the plaintiff in error is contending for two propositions: First, that the contract of assignment of the policies involved was a Georgia contract, and valid under the laws of Georgia; and second, that the Texas courts have violated Section 1, Article 14, of the Amendments to the Constitution of the United States, prohibiting the enforcement of laws impairing the obligation of contracts. This contention can best be answered by dividing the question into two counter-propositions, which we respectfully submit as follows:

First Proposition.

As the contract for the assignment of these policies was made at San Antonio, Texas; was made through Hilsman's agent living at San Antonio; were executed by Cohen and delivered to the bank at San Antonio by Hilsman's instructions; the contract was made and executed in the State of Texas; nothing more was to be done which was necessary in law to make a complete contract, and, therefore, it was a Texas contract, and governed by the laws of that State.

Argument.

We respectfully submit that neither the payment of the purchase price of the policies or their delivery to Hilsman was necessary to pass title, and the terms having been agreed upon by Cohen and Hilsman's agent at San Antonio, the assignments having been executed there, and delivered to the bank by Hilsman's instructions, the contract was not only entered into, but consumated in Texas. Plaintiff in error has based its contention all along on the false premise that delivery of a chattel and payment of

the purchase price is indispensable to the making of a complete contract for its purchase. We contend that a complete and binding contract for the purchase of a chattel can be made without the purchase price ever being paid, or without the chattel ever being delivered. There is a broad distinction between the sale of undesignated and unsegregated chattels and the sale of a specific chattel as in the case at bar. In Meechum on Sales, Vol. 1, Section 843, we find the doctrine thus stated:

> "When the terms of the contract of sale have been "definitely agreed upon, and the goods have been "specifically ascertained, and *nothing remains to be "done by the seller except to deliver the goods*, the "effect of the contract, as between the parties thereto, "will, unless a contrary intention appears, be to vest "the title to the property immediately in the pur- "chaser, *even though the goods have not yet been "delivered or paid for.* The purchaser cannot, in- "deed, take the goods away until he has paid for "them, unless a term of credit has been given, but "the title, and, therefore, the risk, of the goods will "be in him, and the seller may have his remedy for "the price."

The same author, in Section 484, quotes from an English case as follows:

> "I take it to be clear that by the law of England "the sale of a specific chattel passes the property in "it to the vendee without delivery. Where there is "a sale of goods generally, no property in them "passes until delivery, because, until then, the very "goods sold are not ascertained. But where by the "contract itself, the vendor appropriates to the "vendee a specific chattel, and the latter thereby "agrees to take that specific chattel and to pay the "stipulated price, the parties are then in the same "situation they would be after delivery of the goods "in pursuance of a general contract. The very ap- "propriation of the chattel is equivalent to delivery

"by the vendor, and the assent of the vendee to take "a specific chattel and to pay the price is equiv- "alent to his accepting possession. The effect of the "contract, therefore, is to vest the property in the "bargainee."

This same author follows out this theory in Section 485 of the same volume, and the same rule has been endorsed by the Texas court in the case of Embree-McLean Carriage Co. v. Lusk, 11 Texas Civil Appeals, 493.

The United States Supreme Court has adopted the same rule, which it announces in Beardsley v. Beardsley, 138 U. S., 262, and the same rule is laid down in American & English Encyclopedia of Law, Vol. 24, page 1052; by the Supreme Court of Missouri, in Wheeless v. Meyer, 120 S. W., 712, and by the Supreme Court of Kentucky, in Sweeney v. Ousley, 53 Ky., 413.

In the Beardsley case, *supra*, the shares of stock had never been delivered to the purchaser. No attempt had been made to deliver them by sending through the mail or by means of a bank, but on the contrary, the seller repudiated any right of the buyer, but it was held that title to the stock had passed to the vendee though there was neither delivery nor payment of the balance of the purchase price.

Now, in the case at bar, what fact can be relied upon as a basis for the claim that this was not a Texas contract? Nothing, except the bare fact that the assignment was sent through a bank, attached to a sight draft for the amount due, all of which was done under instructions of the vendee, and merely for the purpose of facilitating the payment of the purchase price. It was a sale of a specific chattel, located in Texas, sold by a citizen of Texas, the bill of sale signed and acknowledged in Texas

by the vendor, all in conformity with an agreement with, by an agent of, the vendee, which agent was also residing in Texas at the time the contract was made.

If it be decided that the sale of these policies was a Texas contract, then further consideration of said second assignment would be useless, but for the purpose of fully answering the whole assignment, we submit the following:

Second Proposition under the Second Assignment.

Though the contract of assignment should be held to be a Georgia contract, and a valid one under the laws of that State, yet it being such a contract as is against the settled policy of the State of Texas, as announced by the Supreme Court of Texas, and is in violation of a statute of Texas against dealing in cotton futures, it will not be upheld by the Texas courts, and the law of comity between States will not be applied where such contract is invoked as a defense.

Argument.

In support of the foregoing proposition, we quote from a few of the authorities, and will content ourselves with merely citing a number of them:

In Pope v. Hanke, 40 N. E. Repr., 842, the Supreme Court of Illinois says:

> "A contract made in one State will not be enforced in another when to do so would contravene the criminal laws of the latter State, or would be against the express prohibition of its laws. Comity between different States does not require a law of one State to be executed in another when it would be against the public policy of the latter State. No State is bound to enforce or recognize contracts which are injurious to the welfare of its people, or which are in violation of its own laws."

In the case of Zipcey v. Thompson, 1 Gray, 243 (Mass.), an assignment was made by debtors residing in New York, for the benefit of the creditors, giving preferences, which, although valid in that State, was prohibited in Massachusets. In a contest for property in the latter State, attaching creditors there prevailed. Thomas, Justice, said:

> "The law of New York *proprio vigore* cannot obtain here. It derives its effect only from the rule of comity, and that rule refuses to give force to laws of other States which directly conflict with the policy of our own."

This doctrine is a well settled one, and is the rule adopted by the Supreme Court of the United States in the case of Green v. Van Buskirk, 7 Wall., 150, and followed in the following decisions:

Fowler v. Bell, 90 Tex., 150.
Falkner v. Hyman, 142 Mass., 53.
Hill v. Spear, 50 N. H., 253.

Counsel for plaintiff in error contended in the State court that this was not an action on the assignment to Hilsman, nor an effort to enforce the same, but we ask now, as we did then: "What is the difference between an action by a plaintiff to enforce a void contract and a defense based upon the same kind of contract?" If Hilsman was suing to enforce the assignment, we could plead in defense its invalidity. We are suing on the valid policies of insurance, and in order to defeat our recovery, the insurance company invokes in its defense a contract which it could not recover upon if suing as plaintiff. We think it clear that if the contract of assignment is void, either on account of being against the public policy of the State of Texas, or by reason of being in violation of a criminal

statute of the State, the plaintiff in error cannot invoke its invalidity as a defense with any more show of right than if it were attempting to recover herein as plaintiff. In further reply to the contention that this was a Georgia contract, and should have been decided according to the Georgia statutes and decisions, we submit the following proposition.

Proposition.

Even if this contract had been wholly made in Georgia, it was against the public policy, and against an express statute of that State.

Argument.

In support of the last proposition, we call attention to the Statement of Facts, printed Record, pp. 32 and 33, in which the plaintiff below offered in evidence certain sections of the Georgia code, and certain decisions, to wit:

Section 3668 of the Georgia Code, which is as follows:

> "A contract which is against the policy of the "law cannot be enforced. Such are contracts tend- "ing to corrupt legislation and the judiciary, * * * "wagering contracts."

Section 3537 of the Georgia code, which is as follows:

> "Possibility cannot be sold; * * * a bare contin "gency or possibility cannot be subject to sale un- "less there exists an express and present right in "the person selling a future benefit; so a contract "for the sale of goods to be delivered at a future "day, where both parties are aware that the seller "expects to purchase himself to fulfill his contract, "and no skill or labor or expense enters into con- "sideration, but same is in pure speculation and "chance, is contrary to the policy of the law, and "cannot be enforced by either party."

Section 3671 of the Georgia code, which is as follows:

> "Gaming contracts are void, and all evidence of "debt or encumbrance or liens on the property, ex- "ecuted upon a gaming consideration, are void in "the hands of any person. Money paid or property "delivered, upon such consideration may be recov- "ered back from the winner by the loser if he shall "sue for same in six months after the loss," etc.

It is undisputed, in fact admitted by plaintiff in error, that the assignments of the insurance policies were made as a part of and in connection with a certain transaction in what is commonly called cotton futures, Hilsman and his agent being interested in the transaction. (Printed Record, p. 28, Sec. 8.) This contract was, therefore, in violation of the laws of Georgia, and if it was a Texas contract, it was in violation of the statutes of Texas, as expressed in the acts of the Texas legislature of 1907, page 172, which act has been passed on in the following cases:

Norris v. Logan, 97 S. W., 20.
Jones v. Aiken, 80 S. W., 285.
Seligson v. Lewis, 63 Tex., 220.

The act of the Texas legislature, adopted in 1907, above cited, prohibits the dealing in futures in cotton, grain, etc., when it was not the *bona fide* intention of the parties that the thing mentioned in the transaction should be delivered and paid for, etc., and it makes it a criminal offense, punishable by fine, to make such contract. And the same doctrine is announced in Bigelow v. Benedict, 70 N. Y., 206, and Storey v. Solomon, 71 N. Y., 422.

A sufficient answer to the proposition, however, lies in the statement that had Hilsman sued in the courts of New York, or in the courts of Georgia, to enforce his

illegal contract, based as they were upon a gambling transaction in cotton futures, the courts of those States would have promptly denied him relief; and we may state that a similar result would have been reached had either Hilsman or the insurance company instituted a suit in any of the Federal courts having jurisdiction. Should plaintiff in error be successful in establishing that he had properly raised the Federal question as to the Georgia contract in the Texas courts, and be further successful in sustaining his contention that the contract actually made was a Georgia contract, neither of which propositions, in our humble judgment, are sustainable, then it may be contended that because the assignment of the policies was a Georgia contract, and such assignments being recognized by the Georgia law, that Hilsman would have been entitled to the proceeds of the policies. To this proposition, should it ever be raised, we interpose the objection that dealings in futures, where there is no intention of making actual delivery, are against public policy, illegal and void, not only under the laws of Texas, but also under the laws of Georgia and New York, and it is the rule of construction of the Federal court. See Oscanyon v. Arms Co., 103 U. S., 261; Irvin v. Williams, 110 U. S., 508; Arnott v. Coal Co., 23 Am. Rep. (N. Y.), 190, 195; Tracey v. Talmage, 67 Am. Dec. (N. Y.), 132; Cothran v. Telegraph Co., 83 Ga., 25; Armstrong v. Toler, 11 Wheat., 258, overruling Telegraph Company v. Blanchard, 68 Ga., 299; 45 Am. Rep., 480, it was formerly held by the Supreme Court of Georgia (Telegraph Co. v. Blanchard, *supra,*) that dealings in futures were valid, and that a telegraph company was liable in damages for mis-sending a message with dealings in futures. The Supreme

Court of Georgia, however, has expressly overruled the Blanchard case (Cothran v. Telegraph Co., *supra*), in which Chief Justice Bleckley, in delivering the court's opinion, says that the Blanchard case was decided at a time when it was held that dealings in futures "were regarded as legal and obligatory; but since that time, such dealings have been declared illegal, and hence the case * * * stands as overruled."

In conclusion on this part of the case, we respectfully call the court's attention to Section 8 of the first amended original answer of plaintiff in error filed in the trial court (printed Record, p. 9), in which plaintiff in error specially sets up that this contract of assignment was in furtherance of a gaming transaction; that Hilsman and his agent were interested therein, and that the purpose of the transaction was known by all the parties, which purpose was carried into effect through the said agent of said J. H. Hilsman and J. H. Hilsman, he being engaged in the brokerage business. This fact being uncontroverted, and specially pleaded as a defense by plaintiff in error, we submit that the correct conclusion was arrived at by the Court of Civil Appeals of Texas, whether this be held a Texas contract or a Georgia contract.

Answer to the Third Assignment of Error.

(Page 10, Plaintiff in Error's Brief.)

Under this assignment plaintiff in error contends that Article 3071 of the Revised Statutes of Texas, as construed in this case, is in conflict with and in violation of Section 1, Article 14, of the Amendments to the Constitution of the United States. This was the only Federal question presented at any stage of the proceedings in the State court. Although this question has been heretofore

passed on by the Supreme Court of the United States, in Fidelity, etc., Association v. Mettler, 189 U. S., 150 (46 L. Ed., 922), and a similar statute was upheld in Farmers & M. Ins. Co. v. Dabney, 189 U. S., 301 (47 L. Ed., 823), yet counsel contends that as applied to the facts in this case, said statute is unconstitutional, and cites in support thereof the Wynne case, 224 U. S., 354, but we feel that there are several distinctions to be drawn between that case and the cases first cited. In the first place, the Wynne case was one in which the railroad company had its capital invested in the State of Arkansas, owned its road and roadbed, and a large amount of other property, long prior to the passage of the act in question, and the railroad was powerless to avoid the application of this new law, which was passed subsequent to the acquisition of its property. In the case at bar, the insurance company could operate under the Texas statute or not, as it saw fit, and it came into the State and wrote the policies in question with this law already on the statute books. Again, in the Wynne case, the plaintiff demanded a sum greater than he was entitled to, and greater than he afterwards sued for, while in the case at bar, the plaintiff below recovered the full amount he demanded, and no more, and no more than the insurance company admitted to be due on the policies. These, we submit, are the distinctive facts which differentiate the Wynne case from the case at bar.

It is wholly unnecessary to discuss the power of the State to prescribe the conditions upon which foreign insurance companies may transact their business within such State, as that question is well settled, but we submit that the existence of this power, and its proper exercise

prior to the issuance of the insurance policies involved herein, constitutes the distinction between the case at bar and the Wynne case, and harmonizes the supposed conflict in the two decisions. In one case, the railroad company was compelled by reason of its prior investments to operate under a subsequent statute. In the case at bar, the insurance company could come into the State of Texas under this statute, or remain out, as it saw fit; in the Wynne case, an unjust demand was made upon the railroad company, which was affirmed by the State appellate court; in the case at bar, a just demand was made upon the company in due time for the proper amount due, which the company admitted to be due.

But plaintiff in error contends that it acted in perfect good faith in paying out the money, and should not be held to pay the attorney's fees prescribed by the Texas statutes in such cases. Of course, if it be held that the statute is unconstitutional, then the matter need not be discussed on that issue; but if the contention be that it is unconstitutional only as applied to the facts in this case, then we must review these facts in order to decide the merits of such contention. In all the authorities cited by plaintiff in error, the insurance company had either deposited the money in court, or had filed a plea of interpleader against the respective claimants. In the case at bar, the insurance company voluntarily paid the money to one of the claimants after notice of the rights claimed by Cohen's estate, and after a demand for payment by the executor. The question, then, is not alone one of a willful refusal to pay, but of a wrongful payment to another. If under the facts in this case and the laws of Texas, Cohen's estate was entitled to this money,

then the payment under the above recited facts was not only a willful refusal to pay, but was a wrongful payment to another, and a direct repudiation of Cohen's claims, and he was thereby compelled to assert his rights in the court, compelled to employ counsel, and thus brought the case within the Texas statute, which was passed for the purpose of giving indemnity in just such cases.

In support of its contention that this transaction does not come within the Texas statute awarding attorney's fees, the insurance company cites the case of Insurance Co. v. Bank, 107 S. W., 114. A reading of this case will show that the insurance company had not paid out the money at all, and that two suits had been filed by the rival claimants against the company, and they were afterwards consolidated, and the insurance company interpleaded. Therefore, there had not been either a willful or wrongful refusal to pay, nor had there been a voluntary payment by the insurance company to either of the claimants, and the Texas court very properly held that the facts did not bring the case within Article 3071, and that the company was not liable thereunder. The Court of Civil Appeals discussed the Woods case, cited by plaintiff in error, and distinguished it from the case at bar, and held that in the instant case the insurance company had made a voluntary payment to the rival claimant, who had no right whatever to the amount due on the policies, and with full knowledge on its part of the adverse claim.

Answer to the Fourth Assignment of Error.

On page 11 of the plaintiff in error's brief is the fourth assignment of error, complaining that the Court of Civil Appeals erred in refusing to allow credit for the $460.00

paid by Hilsman to Cohen, deceased. There are several answers to this, either one of which we feel is sufficient.

In the first place, Hilsman was not a party to this suit, had not assigned his claim to the insurance company, and this sum was in no manner due the insurance company, and was in no manner involved in this suit, and by the insurance company's pleadings filed in the trial court, it was not sought to recover this $460.00, and no prayer was asked for its recovery. Therefore, said sum was not in any manner an issue in the case, and the trial court could not have rendered judgment for said sum even though the facts had shown that Hilsman had made an assignment of the same to the insurance company.

But if this be not sufficient answer, then we think that the foregoing authorities and argument as to the illegality of said contract under both the Georgia laws and the laws of Texas would bar a recovery even by Hilsman by himself, were he a party to this suit, and this was so held by the Court of Civil Appeals in its opinion in this case. (Printed Record, p. 64, Sec. 73.)

But, in any event, as this money was paid out by Hilsman, and not by the insurance company, and the insurance company is in no manner, so far as this Record shows, entitled to said $460.00, in any event, we fail to see how it could expect to recover said sum, even if the original contract between Hilsman and Cohen had been a valid one.

Answer to the Fifth Assignment of Error.

On page 11 of the insurance company's brief, the following assignment is submitted:

> "The Court of Civil Appeals erred in deciding "against the titles, rights, privileges and immunities

"specially set up and claimed by said insurance com-
"pany under the Constitution and statutes of the
"United States."

In reply to this assignment, we submit the following proposition:

"The assignment raising the Federal question must "be specific, and a vague and general statement that "it was against the Fourteenth Amendment, etc., "will not raise a Federal question."

In support of this, we again refer to the case of Clark v. McDade, 165 U. S., 170 (41 L. Ed., 673); Hamblen v. Western Land Co., 147 U. S., 531 (37 L. Ed., 267); Maxwell v. Newbold, 18 How., 511, and Messenger v. Mason, 10 Wall., 507.

As we understand the brief and argument for plaintiff in error, there have been but two Federal questions raised specifically enough to require this court to consider the same, and one of these was not raised at all in the State courts, and the other we have dealt with under the third assignment of error, and will, therefore, refrain from further discussion of the fifth assignment, which, we submit, is too vague and indefinite to justify a consideration by the court.

Answer to the Sixth Assignment of Error.

We respectfully submit that this is a general assignment which requires the Supreme Court to go into all the facts of this case in order to decide whether or not the plaintiff's petition was good on general demurrer in the trial court, and whether or not the trial court and the Court of Civil Appeals erred in deciding on the facts, and we respectfully submit that said assignment is too vague and general to require a consideration thereof by

the Supreme Court, and even if it were not too vague and general, yet it will call upon the Supreme Court to pass upon matters which are not properly before it, or within its jurisdiction on writ of error.

In this connection, we desire to reply to various theories and arguments advanced by counsel for plaintiff in error, as to how far the Supreme Court will go in considering a case when it has once acquired jurisdiction by reason of a Federal question. We think it too well settled for argument that, if the Supreme Court, in the case at bar, decides that the State court properly decided the Federal question upon which the case is brought here, that this court will go no further, and will affirm the case. But in the event this court should hold that the Texas statute, as applied to the facts in this case, is unconstitutional, it becomes important to discuss the further action of this court in dealing with this case.

We respectfully submit that the Supreme Court will, on writ of error *from a State court*, confine its jurisdiction to the Federal questions raised in the State court, and will not inquire into the correctness of the State Court's decision, on *general principles of law or equity jurisprudence* unaffected by anything found in the Constitution, laws or treaties of the United States.

In Murdock v. Mayor of Memphis, 20 Wall., 590 (22 L. Ed., 429), this question was ably presented by learned counsel, and on invitation of the Supreme Court, additional counsel as *amicus curiae* presented briefs and oral argument, and after careful consideration, the rule was adopted as above stated. This decision was rendered in 1875, and has been followed by the later decisions of this court.

In Myrick v. Thompson, 99 U. S., 297 (25 L. Ed., 324), the plaintiff in error contended that the Supreme Court should consider other questions decided by the State courts, *not of a Federal character,* but the Supreme Court, without a dissenting opinion, cited the case of, and applied the rule in Murdock v. Memphis.

So far as counsel for defendant in error have been able to discover, no decision has overruled, or even criticised, the rule adopted in the Murdock case, and counsel for plaintiff in error has not so contended, but has cited some decisions to the effect that a non-federal question will be considered *only for the purpose of deciding the Federal question*, as in the case of Atlantic, etc., R'y v. Wharton, 207 U. S., 328, but which clearly has no application to the case at bar.

We respectfully submit that if it should be held by this court that the Federal question was improperly decided by the Texas courts, and that Article 3071 of the Texas statutes is, as applied in this case, unconstitutional, then the decision would only go to the question of the attorney's fees and damages assessed against plaintiff in error and on the general question of the assignability of the contract of insurance by reason of it being a gaming transaction, as found by the Court of Civil Appeals and trial court, the finding of the State courts would be final, and this question would not be inquired into, as it does not in anywise involve a Federal question.

In the case of German Savings Society v. Dormitzer, 192 U. S., 124 (48 L. Ed., 373), the Murdock case is affirmed in an opinion by Mr. Justice Holmes, and the rule is stated to be that when a case is properly brought up from a Circuit Court, upon constitutional grounds, the

whole case is before the Supreme Court, but that it is otherwise when a case comes from a State court. In rendering this decision in the Dormitzer case, the court also cites the cases of Horner v. United States, 143 U. S., 570 (36 L. Ed., 266); Osborne v. Florida, 164 U. S., 650 (41 L. Ed., 586), and McLaughlin v. Fowler, 154 U. S., 663 (26 L. Ed., 176), the three last named cases clearly distinguishing the rule as applied to cases originating in the State courts, and holding that in such cases only the Federal question will be considered by the Supreme Court

In the case at bar, if the Texas statute, Article 3071, should be held unconstitutional, then, as that was the only Federal question raised by plaintiff in error in the State courts, such finding would only result in a reversal of the decision of the State courts as to the attorney's fees, and the twelve per cent damages allowed, but as to the non-federal question decided by the State courts, their finding will be held conclusive, and will not be disturbed by the Supreme Court; but if, on the contrary, the statute be upheld, then there is nothing left in this case to give the Supreme Court jurisdiction, and the case must be affirmed.

Plaintiff in error cites the case of Railway v. Dennis, 224 U. S., 503, in support of its contention that this court will take jurisdiction of all the questions in the case after it has taken jurisdiction on a Federal question. A reading of the case cited will show that it has no application, except to strengthen the position of defendant in error, for, in that case, Mr. Justice Van Devanter said: "For while, on writ of error to a State court, our province ordinarily is only to inquire whether that court has erred in the decision of some Federal question," etc.

That was a case in which the State Supreme Court, in another case involving the same constitutional question, had held a Texas statute unconstitutional after the case then under consideration had been brought to this court on writ of error, and this court held that under such a state of facts, it had the right to consider the question solely on the showing that the State Supreme Court had held a State statute unconstitutional.

On page 29 of its brief, plaintiff in error cites the case of Beer v. Landman, 88 Texas, 450, in which it was held by the Supreme Court of Texas that a transfer of securities, sufficient in legal form, passed the legal title, although it was a gaming transaction, and that the court would not aid either of the parties to recover, or reinvest himself with any title, etc.

This is merely stating a well settled rule, probably prevailing in all of the States, but has no application to the case at bar, for the reason that this is an action on the insurance policies which are admitted by all parties to be valid, while the invalidity of the assignment to Hilsman is invoked by the insurance company in its pleadings and by the agreed Statement of Facts, as a defense to an action on a valid contract.

Counsel did not state the facts existing in the Beer-Landman case, because it would not have served his purpose; in that case the maker of a promissory note was seeking to enjoin the collection of it after judgment thereon, because the note had been given in a gambling transaction, and the Supreme Court held that he should have offered his defense in the main suit on the note, and that a court of equity would not aid him.

This is not an action by Cohen to recover anything of Hilsman, and is not an action by Hilsman to recover

back the $460.00 he paid Cohen; therefore, the principle enunciated by the Beer-Landman case has no application.

Plaintiff in error cites the case of Furman v. Nichols, 8 Wall., 75, and Tilt v. Kelsy, 207 U. S., 43, on the question as to whether this court has acquired jurisdiction by reason of the proper presentation of a Federal question. This question is not at issue between the parties, because it is not contended that the Federal question pertaining to the constitutionality of Article 3071 was not sufficiently presented to give this court jurisdiction, but our contention is simply that the jurisdiction must be confined to that one question: First, because that was the only question raised in the State court; second, because this is a writ of error granted to a State court, and the Supreme Court will not consider questions of general law when it is not charged that the conclusion reached by the State court conflicts with a Federal statute, or the Federal Constitution.

Argument on the Rule in Texas as to Assignability of Life Insurance Policies.

Counsel for plaintiff in error has attempted to show in his closing argument, on pages 42 *et seq.* of his brief, that the opinion of the Court of Civil Appeals in the case at bar is not in harmony with the Supreme Court of Texas, and there being so little basis for this contention, we will briefly review some of the Texas decisions on this question.

Plaintiff in error cites the cases of Schonfield v. Turner, Cheeves v. Anders, and Insurance Company v. Williams, on the proposition that a named beneficiary in a policy may collect the proceeds, and after reimbursing

himself for what he may have paid out, will be held a trustee for those entitled to receive the balance. In answer to this, we deem it sufficient to quote from the opinion rendered herein by the Court of Civil Appeals, as follows:

> "But that doctrine can have no application in "this case. Here, as admitted by the defendant, in "the agreement upon which the case was tried, the "insurance company knew when it paid Hilson the "face value of the policies that he claimed them as "his own adversely to the estate of the insured; that "as the owner, he claimed he was entitled to the en- "tire amount, less the sum of the loans due the in- "sured, as his own property, independent of the "claims of the executor of the estate of Jacob Cohen, "and that when paid to him he would hold the same "as his own, without recognition of the trust in favor "of those who were equitably entitled to the benefit "of such funds. In other words, with full knowledge "of the claim of Cohen's executor, to the amount due "on the policies, and the ground upon which it was "based, and that Hilsman denied the existence of "the trust that equity charged him with, and of his "entire repudiation of the same, and that he would "appropriate the proceeds of the policy to his own "exclusive benefit, in violation of the right of the "insured's executor therein, it paid him the full "face value of the policies; thus aiding and abetting "and enabling him to acquire possession of money "which the law charged it with knowledge that the "fund belonged to the insured's estate, well know- "ing that Hilsman would hold it against the rights "of the real owner."

We respectfully submit that if the assignment was void, Hilsman acquired thereby no right, title or interest in the policies or their proceeds, and he occupied exactly the position of any other stranger to the transaction, and the insurance company paid him the money at its peril.

Without hesitancy, we assert that no Texas decision

can be found which holds that an insurance company is justified in making payment of the proceeds of a policy to an assignee with no insurable interest after it has due notice of the fact, and after the party entitled to such proceeds had made demand for payment and asserted his rights. If the attempted assignment was void, then there was neither title, interest, or authority vested in the assignee, and if any authority to collect had been so vested, it could have been revoked by the insured, or by his legal representatives, by acting in due time, as was done in this case. A void assignment certainly conferred no greater power on Hilsman than a power of attorney to collect would have done, and it is clear that such power could have been revoked by Cohen before payment was made to Hilsman, and the insurance company could not have claimed protection if it made payment after due notice of the revocation.

Counsel for plaintiff in error has selected isolated statements from several Texas decisions to sustain his position, but has not stated the facts in each case sufficiently to show what was involved and what the court held. In the class of cases cited by plaintiff in error, the policies were made payable to a designated beneficiary, who was the party attempting to collect on them, or to whom the amount due thereon had been already paid. In the Cheeves-Anders case, no payment had been made to any one, but all claimants were before the court, and the insurance company was there merely as a stake-holder, having refused payment until conflicting claims had been adjudicated. In the case last cited, the question of the right to make payment to Cheeves merely because he was named in the policy as one of the co-partners, was not in-

volved, and, therefore, any seeming decision of that question was merely *dicta*.

In the Cheeves-Anders case, in passing on the same question as is involved in the case at bar, the Supreme Court said:

> "We, therefore, hold that, in this case, the interest "which Cheeves ever had in this policy as partner, "aside from his interest which was joint with Chilton, "and therefore belonged to the partnership, ceased "at the dissolution of the firm, and will not sustain "said claim to the proceeds of this policy."

This was said in a case in which the policy, by its express terms, was payable to Chilton and Cheeves, and had been assigned by Chilton to Cheeves, who was then claiming the whole proceeds by reason of such assignment.

In Insurance Company v. Williams, 79 Texas, 633, the insurance company was itself contesting Mrs. Williams' claim to the proceeds of the policy, on the ground that she had no insurable interest, and the court held that as it had made a contract in which Mrs. Williams was named as the beneficiary, the insurance company would not be heard to set up lack of interest in order to defeat recovery on the policy.

Plaintiff in error cites other decisions from other States asserting the same doctrine, but these authorities have no application, because they were not contests between the insurance company and the named beneficiary in the policy, and in such cases the courts have held that the insurance company, after making the contract, cannot set up in defense to an action on the policy that the named beneficiary had no insurable interest, but no such rule is announced in cases where there is a contest between one who had and one who had not an insurable interest.

On page 46 of its brief, plaintiff in error asserts that there is no opinion of any Texas court, except the one in this case, which qualifies what it has contended for herein. If by this is meant that the courts have not qualified the doctrine that an insurance company cannot, in order to defeat a recovery on a policy, set up that the named beneficiary has no insurable interest, then we agree in all things with that contention, if it is meant that the Texas courts have not adhered to the well settled doctrine in that State, that one who has no insurable interest in the life of another cannot recover the proceeds of such policy, then we most emphatically assert that this contention is unsound, and is not supported by the Texas decisions.

In the case of Cameron v. Barcus, 71 S. W., 423, this very question is decided by the Court of Civil Appeals, and no writ of error granted by the Supreme Court.

In Dugger v. Insurance Company, 81 S. W., 335, the same doctrine is adopted, and a careful reading of the very decisions cited by plaintiff in error, to wit: Cheeves v. Anders, 87 Texas, 291; Schonfield v. Turner. 75 Texas, 329, and Fletcher v. Williams, 66 S. W., 861, will show that they lay down the same doctrine as applied to a similar state of facts as exist in this case. In further support of this doctrine, we refer to Wilton v. Insurance Company, 78 S. W., 403; Insurance Company v. Hazelwood, 75 Texas, 351.

A reading of the foregoing decisions will clearly show that plaintiff in error has emphasized those portions of the decisions that have no bearing on the case at bar, as they were dealing with a contest between an insurance company and a named beneficiary, and in which the insurance company, in order to defeat recovery, was setting up a lack of insurable interest in the named beneficiary.

In Conclusion.

In closing, we respectfully submit that if Article 3071 of the Texas statutes is held constitutional, this Honorable Court will not further inquire into the merits of this case, for the reason that the Federal question was properly decided by the State court. If that statute should be held unconstitutional, as applied to the facts in this case, then the Supreme Court would only reverse as to the attorney's fees and damages allowed under said statute.

The Court of Civil Appeals having held that the policies in this case were not assignable under the settled policy of the State of Texas, and having held that the contract and assignment was void on account of a criminal statute of the State of Texas against gambling in cotton futures, and if right on either of these questions, then as to the main case, the Supreme Court will not interfere, as they do not involve a Federal statute or other Federal question, and the opinion of the State court will prevail.

As we think there is a clear distinction between the Wynne case, involving the Arkansas statute, and the Mettler case, and the case at bar, involving the Texas statute, we respectfully submit that this cause should in all things be affirmed, with damages for delay.

Respectfully submitted.

Wilmer S. Hunt.

Attorney for Defendant in Error.

STERLING MYER,
CLARENCE A. TEAGLE,
Of Counsel.

MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK v. COHEN, EXECUTOR.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 160. Submitted April 17, 1914.—Decided June 8, 1914.

A Federal question may not be imported into a record for the first time by way of assignment of error made for the purpose of review by this court.

As a general rule, for the purpose of review by this court, rights under the full faith and credit clause of the Federal Constitution are required to be expressly set up and claimed in the court below.

Denial of full faith and credit to the statutes of another State cannot be made the basis of review by this court where it appears that the court below reached the same result that plaintiff contended for on grounds wholly independent of the Federal question and sufficient to sustain its action.

This court has already decided that state statutes, such as that of Texas imposing a 12% penalty and an attorney's fee, for damages for delay in payment of proper claims, are not unconstitutional under the Fourteenth Amendment as depriving life insurance companies of their property without due process of law or as denying them the equal protection of the law.

A payment made by a life insurance company to one of two claimants on receiving a bond of indemnity, *held*, under the circumstances of this case, not to have been the payment of a stakeholder seeking to discharge his duty but of a person espousing the cause of one claimant against the other and thereby subjecting himself to the legal consequences arising from his action.

This court cannot review on its merits a case which it must dismiss for want of jurisdiction.

THE defendant in error was the plaintiff below and sued the Manhattan Life Insurance Company, which we shall speak of as the Company, on two policies on the life of Jacob Cohen in his own favor, written in 1893 in Texas where Cohen resided, the Company then doing business in that State through an agency. It was averred that although the Company had admitted liability on the policies, it had not paid the loss and was therefore responsible

not only for the sum due insured with interest, but also for 12 per cent. as statutory penalty or damages and $1000.00 attorneys' fees.

The answer denied liability to the plaintiff. It admitted issuing the policies, but averred that in 1907 the insured, Cohen, borrowed $875 on each and pledged the policies as security, which loans were unpaid. It was averred that in July, 1907, Cohen sold to Hilsman, of Atlanta, Georgia, his interest in the policies and executed assignments and orders on the Company to deliver the policies to him on payment of the debts for which they were pledged. These documents were annexed to the answer. The origin and course of the negotiation which ultimated in the assignments were thus stated: Hilsman had an agent at San Antonio, Texas, where Cohen lived. The transactions "were begun" and "definitely agreed upon" between Cohen and the agent, "the agreement being that Hilsman would pay Jacob Cohen $460.00 for his equity in said policies, whereupon Cohen wired Hilsman to send papers, and the following correspondence, by letter and telegram, passed between them." Hilsman in answer to the first telegram from Cohen wrote enclosing him assignments of the policy and necessary notices to the Company with directions for their execution and asking besides for certain papers which he required to show Cohen's ownership free from the claims of other persons, the letter ending with the statement, "Send all the papers, that are herewith enclosed, duly executed in a sealed envelope, with this draft attached, (evidently the draft for the price) and upon arrival if in good shape—we will duly honor." Cohen replied by letter explaining that he did not have particular papers which had been asked for, but had others which he thought were their equivalent and proposing to execute the assignment and send these papers, the letter concluding with the statement, "if this meets with your approval please wire me upon receipt of this letter and I

shall forward papers." Hilsman answered by telegram favorably and confirmed it by letter saying that if the papers were sent, "we will promptly honor the draft, provided the papers are in good shape." On the day the telegram last referred to was received, Cohen transmitted the executed papers with the accompanying documents by mail saying, "I beg to inclose all documents . . . which I trust you will find correct and will honor my draft for $460.00 attached to these documents." The answer specifically alleges that the draft was sent from San Antonio for collection through a bank in that place and as the answer states that the draft was attached to the papers and this conformed to the instructions which we have seen were given by Hilsman to Cohen, the answer therefore in effect averred that the papers and draft were delivered to a bank in San Antonio to be transmitted to Atlanta, the papers to be delivered to Hilsman if after examination he found the papers satisfactory and paid the draft. The answer then in paragraph 8 contained the following averments:

"Said Jacob Cohen, Hilsman and his said agent were engaged in speculative transactions, and said assignments were made as a part of and in connection with a certain transaction in what is commonly called 'cotton futures,' the money being paid to and received and used by Jacob Cohen to speculate in the future price of cotton, without its being contemplated that there would be actual delivery thereof, or bargain and sale, the said Hilsman or his said agent, being interested in the transaction, and the purpose of the transaction being known by all the parties, which purpose was carried into effect, through the said agency of J. H. Hilsman and J. H. Hilsman he being engaged in the brokerage business."

It was averred that after the death of Cohen both his executor and Hilsman, as owners of the policies, made demand upon the Company for payment; that the Company admitted liability to some one and simply professed its

desire to have the matter as to who was owner of the policies settled so that it might make payment with safety. To reach this result it was alleged that an unsuccessful effort was made to have the parties agree to appear in a suit where as to both of them, the Company admitting liability, their rights might have been determined; and that failing in this respect and being advised that under the law of Georgia where the assignment to Hilsman was made, it was legal and therefore his claim was valid, as the most expeditious way of clearing up the matter the Company paid Hilsman and took from him an indemnity bond. While admitting that before the assignment and at the time of its delivery Hilsman had no interest whatever in the life of Cohen, it was nevertheless averred that the assignment of the policies was valid and authorized under the laws of the States of Georgia and New York. Averring moreover that all the acts of the Company in the premises had been in good faith and arose not from any desire to deny liability but simply from an honest purpose to have it determined who owned the claims under the policy, it was asserted that there could be in no event any liability for interest by way of damages and for the attorney's fees as prayed.

By leave the plaintiff amended his petition "in replication and answer to . . . the answer of the defendant, Manhattan Life Insurance Co.," and asserted among other things that the assignments of the policies alleged in the answer were void upon two distinct grounds: (1) Because "under and by virtue of the laws of the State of Texas, the State of New York and the State of Georgia, and each of them, an assignment of a life insurance policy to a person without insurable interest in the life of the insured, is invalid and not binding upon the assignor or his representative." (2) Because "said alleged assignments of the policies of insurance sued upon herein are invalid and not binding upon it and were without legal consideration un-

der the laws of the State of Texas, the State of New York, and the State of Georgia, for this, that at the time that said assignments and each of them were made, executed and delivered, that the said Jacob Cohen, J. H. Hilsman and his said agent, were engaged in speculative transactions and that said assignments and each of them, were made as a part of and in connection with the said transactions, in what is commonly called 'cotton futures,' the money being paid to and received and used by the said Jacob Cohen to speculate in future prices of cotton without its being contemplated that there would be actual delivery thereof, or bargain and sale; the said Hilsman and his agent being interested in the transaction and the purpose of the transaction being at and before the time known to and by all the parties which said purpose was carried into effect through the said agency J. H. Hilsman and J. H. Hilsman, he being engaged at that time in the brokerage business; all of which said facts were well known to the defendant Insurance Company at and before the time that it paid the said policies to the said Hilsman, as in its said answer alleged and set forth."

For the purpose of the trial by the court without a jury a written statement of facts was agreed to by both parties in the form of petitioner's case, the case of the defendant company and the reply of the petitioner. The statement of the plaintiff admitted the issue of the policies, the lending of the money by the Company and the pledging of the policies to secure it, the transfer or assignment by Cohen for the consideration we have stated and under the circumstances which we have detailed, the gambling nature of the transaction being expressly stated in accordance with the averment of the answer of the Company and with the allegation of the amended pleading of the plaintiff, the death of Cohen, the claim of both parties on the insurance company, the effort of the Company to secure a suit to which both the claimants should be parties in order to

relieve it from responsibility, its failure to secure that result and its payment to Hilsman of the amount upon the giving by him of indemnity, all substantially as alleged in the pleadings we have stated. The agreed facts contained this statement:

"It was not the purpose of the Insurance Company to contest or delay payment, and the payment to Hilsman was made under the circumstances above set out. It is not the purpose of this agreement to determine how far, if at all, the facts in respect to notice and good faith are material issues in this case, that being deemed a question of law, nor is this agreement to be construed as admitting as a matter of law that Hilsman had any right to said policies or their proceeds, or that said payment, or any part thereof, was rightfully made to him. It is, however, agreed as a fact that Hilsman has not been repaid said sum of $460.00, and the Insurance Company has not been repaid the amount of said loan, except as above stated, and that nothing has yet been paid to the plaintiff."

The Company as part of its case introduced certain statutes of the State of Georgia and decisions of the court of last resort of that State interpreting the same for the purpose of showing that Cohen had a right to sell and Hilsman to purchase in Georgia the insurance policies, although Hilsman had no insurable interest in Cohen's life. In rebuttal the plaintiff introduced certain decisions of the court of last resort of Georgia deemed to establish the contrary result and also offered statutes of that State dealing with gambling transactions and the right to sue concerning the same. The trial court found the facts substantially as embodied in the statements referred to.

Mr. William J. Moroney for plaintiffs in error:

The Texas statute, as construed and applied in this case by the state court, is repugnant to the Fourteenth Amendment.

The judgment of the state court denied full faith and credit to the statutes of Georgia that were pleaded and proved in defense of this suit, in violation of the full faith and credit provision of the Constitution of the United States.

In support of these contentions, see Rev. Stat. Texas, Art. 3071; Civil Code Georgia, §§ 2114, 2116, 3077; *Atchison T. & S. F. Ry. Co.* v. *Sowers*, 213 U. S. 55; *Atlantic Coast Line Ry. Co.* v. *Wharton*, 207 U. S. 328; *Attorney General* v. *Lowrey*, 199 U. S. 639; *Bacon* v. *Texas*, 163 U. S. 216; *Beer* v. *Landman*, 88 Texas, 450; *Bolin* v. *St. Louis Ry. Co.*, 61 S. W. Rep. 444; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116; *Cawthorne* v. *Perry*, 76 Texas, 338; *Cheeves* v. *Andres*, 87 Texas, 287; *Clark* v. *San Francisco*, 124 U. S. 639; *Collins* v. *Texas*, 223 U. S. 288; *Dartmouth College Case*, 4 Wheat. 518; *El Paso Ry. Co.* v. *Gutierrez*, 215 U. S. 87; *Estay* v. *Luther*, 142 S. W. Rep. 649; *Farmers' Ins. Co.* v. *Dobney*, 188 U. S. 301; *Fidelity Life Ins. Co.* v. *Mettler*, 185 U. S. 308; *Fidelity Life Ins. Co.* v. *Zapp*, 160 S. W. Rep. 139; *Furman* v. *Nichol*, 8 Wall. 44; *Ex parte Garland*, 4 Wall. 333; *Grigsby* v. *Russell*, 222 U. S. 149; *Gulf, C. & S. Fe Ry. Co.* v. *Dennis*, 224 U. S. 503; *Gulf, C. & S. Fe Ry. Co.* v. *Ellis*, 165 U. S. 150; *Illies* v. *Fitzgerald*, 11 Texas, 429; *Iowa Life Ins. Co.* v. *Lewis*, 187 U. S. 264; *Ludy* v. *Larson*, 37 L. R. A. (N. S.) 907; *Martin* v. *West*, 224 U. S. 191; *Murdock* v. *Memphis*, 20 Wall. 590; *Northwestern Life Ins. Co.* v. *McCue*, 223 U. S. 234; *Pacific Life Ins. Co.* v. *Williams*, 79 Texas, 633; *St. Louis Ry. Co.* v. *Wynne*, 224 U. S. 354; *Schofield* v. *Turner*, 75 Texas, 324; *Southwestern Ins. Co.* v. *Woods Nat'l Bank*, 107 S. W. Rep. 114; *Stanley* v. *Schwalby*, 162 U. S. 255; *Tilt* v. *Kelsey*, 207 U. S. 42; *Vandalia Ry. Co.* v. *Indiana*, 207 U. S. 359; *Washington Life Ins. Co.* v. *Gooding*, 49 S. W. Rep. 123; *Wilson* v. *Black Bird Creek Co.*, 2 Pet. 245; *Yazoo &c. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217.

Mr. Wilmer S. Hunt, Mr. Sterling Myer and *Mr. C. A. Teagle* for defendant in error:

The Supreme Court will not consider questions not raised and passed on in the court below, nor consider other Federal questions than the one raised.

The assignment of the insurance policies was a Texas contract.

If the contract was a Georgia contract, yet if invalid under the laws of Texas, the law of comity between States does not require its enforcement by the Texas courts.

The contract of assignment was even void under the laws of Georgia.

Article 3071, Texas Rev. Stat., is constitutional.

There was no right of the insurance company to recover the $460.00 paid to Cohen by Hilsman.

A general assignment raising a Federal question will not be considered.

On error from a state court, the Supreme Court will only consider the Federal question which gives it jurisdiction.

In support of these contentions, see Acts Texas Legislature 1907, p. 172; 24 Am. & Eng. Ency. of Law, 1052; *Armstrong* v. *Toler*, 11 Wheat. 258; *Arnott* v. *Coal Co.*, 23 Am. Rep. (N. Y.) 190; *Association* v. *Mettler*, 189 U. S. 150; *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328; *Beardsley* v. *Beardsley*, 138 U. S. 262; *Beer* v. *Landaman*, 88 Texas, 450; *Bigelow* v. *Benedict*, 70 N. Y. 206; *Cameron* v. *Barcus*, 71 S. W. Rep. 423; *Capitol City Dairy Co.* v. *Ohio*, 183 U. S. 238; *Cheeves* v. *Anders*, 87 Texas, 291; *Clark* v. *McDade*, 165 U. S. 170; *Cothran* v. *Telegraph Co.*, 83 Georgia, 25; *Dewey* v. *Des Moines*, 175 U. S. 193; *Dugger* v. *Ins. Co.*, 81 S. W. Rep. 335; *Embree* v. *McLean Co.*, 11 Tex. Civ. App. 493; *Falkner* v. *Hyman*, 142 Massachusetts, 53; *Farmers Ins. Co.* v. *Dabney*, 189 U. S. 301; *Fletcher* v. *Williams*, 66 S. W. Rep. 861; *Fowler* v. *Bell*, 90 Texas, 150; *Furman* v. *Nichols*, 8 Wall. 75; Georgia Code,

Arts. 3537, 3668, 3671; *German Society* v. *Dormitzer*, 192 U. S. 124; *Green* v. *Van Buskirk*, 7 Wall. 139; *Hamblen* v. *Western Land Co.*, 147 U. S. 531; *Hill* v. *Spear*, 50 N. H. 253; *Horner* v. *United States*, 143 U. S. 570; *Insurance Co.* v. *Bank*, 107 S. W. Rep. 114; *Insurance Co.* v. *Williams*, 79 Texas, 633; *Insurance Co.* v. *Hazelwood*, 75 Texas, 351; *Irvin* v. *Williams*, 110 U. S. 508; *Jones* v. *Aiken*, 80 S. W. Rep. 285; *Keokuk & H. B. Co.* v. *Illinois*, 175 U. S. 193; *Maxwell* v. *Newbold*, 18 How. 511; *McLaughlin* v. *Fowler*, 154 U. S. 663; 1 Meechum on Sales, §§ 8430, 484; *Messenger* v. *Mason*, 10 Wall. 507; *Murdock* v. *Memphis*, 20 Wall. 590; *Myrick* v. *Thompson*, 99 U. S. 297; *Norris* v. *Logan*, 97 S. W. Rep. 20; *Osborne* v. *Florida*, 164 U. S. 650; *Oscanyon* v. *Arms Co.*, 103 U. S. 261; *Pope* v. *Hanke*, 40 N. E. Rep. 842; *Railway* v. *Dennis*, 224 U. S. 503; *Railway* v. *Wynne*, 224 U. S. 354; Rev. Stat. Texas, Art. 3071; *Schonfield* v. *Turner*, 75 Texas, 329; *Seligson* v. *Lewis*, 63 Texas, 220; *Storey* v. *Solomon*, 71 N. Y. 422; *Sweeney* v. *Ousley*, 53 Kentucky, 413; *Telegraph Co.* v. *Blanchard*, 68 Georgia, 299; *Tilt* v. *Kelsey*, 207 U. S. 43; *Tracey* v. *Talmage*, 67 Am. Dec. (N. Y.) 132; *Wheeless* v. *Myer*, 12 S. W. Rep. 712; *Wilson* v. *Namie*, 102 U. S. 572; *Wilton* v. *Ins. Co.*, 78 S. W. Rep. 403; *Zipcey* v. *Thompson*, 1 Gray (Mass.), 242.

Mr. Chief Justice White, after making the foregoing statement, delivered the opinion of the court.

Upon the pleadings which we have just stated and the facts stipulated, the trial court gave judgment for the plaintiff, Cohen, against the defendant company for the amount of the policies less the sums which had been loaned thereon by the Company with interest and with the statutory penalties and attorney's fees claimed.

To recapitulate, it suffices to say that the assignments of error made by the Company in the court below for the

purpose of the appeal by it taken but expressed the defenses resulting from its answer and the stipulated facts which we have stated. That is to say, reliance was placed (1) upon the proposition that in any event the recourse of the plaintiff was against Hilsman and not against the Company; (2) that the transfer of the policies to Hilsman was a Georgia contract and valid under the law of that State because the existence of insurable interest at the time of the transfer, although necessary under the Texas law, was not necessary under the Georgia law; (3) that as in any event the transaction out of which the assignment of the policies from Cohen to Hilsman grew was admittedly a gambling one, the court would not allow the executor of Cohen to derive any rights from assailing that transaction, but would leave the parties where their illegal contract had placed them, that is, let the assignment to Hilsman stand, and hence leave no right in Cohen, executor, to recover; (4) that the court erred in giving judgment for the statutory penalties and damages because under the circumstances stated the liability to pay them was not embraced by the statute under which they were imposed and that if the statute, as construed, imposed the damages and attorney's fee which were allowed, it was in violation of § 1, of the Fourteenth Amendment.

In an elaborate opinion the court disposed of all these contentions. It held that the suit need not be brought against Hilsman but that it could be brought directly against the Company. It decided that the contract of assignment was a Texas contract and for want of insurable interest in Hilsman was invalid under the laws of that State, although it was in substance admitted that it would have been valid, so far as the question of insurable interest was concerned, if it had been a Georgia contract. Coming to consider the fact that both parties had conceded that the transaction out of which the assignment of the policies grew was purely of a gambling nature and that that fact

had been stipulated, the court refused to sustain the following proposition which was insisted upon by the defendant company: "When an insurance policy is assigned as part of a gaming transaction, the law will give no relief to either party, or to their heirs, executors or assigns, regardless of all other questions, but will leave the parties where they have voluntarily placed themselves." On the contrary the court, relying upon the Texas law upon that subject, the Georgia law on the same subject and the principles of general law applicable thereto, held that instead of leaving the assignment growing out of the gambling transaction enforceable in the hands of Hilsman it would in consequence of the illegality, strike down the whole transaction and therefore leave the policy in the hands of Cohen the insured, to whom it belonged before the assignment had been made. And for this reason also the court decided that the sum paid by Hilsman for the transfer need not be repaid by Cohen in order to recover. On the subject of the penalties the court referring to the cases of *Fidelity Mutual Life Association* v. *Mettler*, 185 U. S. 308, and *Farmers' & Merchants' Insurance Company* v. *Dobney*, 189 U. S. 301, held that the statute under which they were imposed was not repugnant to the Fourteenth Amendment and said: "The action of the Insurance Company in paying the money due on the policies was not, as in *Insurance Co.* v. *Woods Nat. Bank*, 107 S. W. Rep. 119, an offer of the Insurance Company to pay to the one of the two real claimants when it should be determined whom he was, but a voluntary payment to the rival claimant who had no right whatever to the amount due on the policy. The company has indemnified itself against its act in paying the money due on the policy to one who was not entitled to receive it; now let it resort to its indemnity."

At the threshhold we must dispose of a motion to dismiss. It is apparent from the statement of the case that the only express assertion of Federal right had reference to

the statutory penalty and the attorney's fee. The assignments of error however, assert violations of rights under the Constitution in many particulars, but more especially with reference to the action of the court in treating the sales of the policies as Texas contracts and refusing to apply the Georgia law which admittedly differed fundamentally from that of Texas. It is elementary that a Federal question may not be imported into a record for the first time by way of assignments of error made for the purposes of review by this court. Moreover as a general rule it is true that for the purposes of review by this court rights under the full faith and credit clause, § 1, Article IV of the Constitution, come within that class which are required to be expressly set up and claimed in the court below. *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491; *El Paso and Southwestern R. R.* v. *Eichel*, 226 U. S. 590, 597; *Chicago, Ind. and L. Ry. Co.* v. *Hackett*, 228 U. S. 559, 565. Let it be conceded, as we think it must be, where the record leaves no doubt that rights under the full faith and credit clause were essentially involved and were necessarily passed upon, there would be jurisdiction to review even although such rights had not been expressly asserted below (see *Tilt* v. *Kelsey*, 207 U. S. 43, 51); the right to review under such condition being in effect but a result of the elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided. But these concessions are irrelevant, even although it be further conceded that the ruling of the court below as to the necessity for an insurable interest and its governing the case by the law of Texas instead of by the law of Georgia brings this case within the doctrines just stated. We say this because of the existence of another and fundamental question which causes the concessions stated to be immaterial. Both parties, as we have seen, wholly independent of the existence of an in-

surable interest, affirmed the illegality of the transaction out of which the assignments of the policies grew because of the alleged gambling nature of the transaction and the admitted facts without dispute established that situation. There being thus an admission by both parties and no dispute concerning the illegality of the transaction and a difference only as to the consequences to arise from such illegality, it follows that the case reduces itself to a consideration of that subject. But on coming to its consideration it is plain that no question concerning the full faith and credit clause was involved in any contention made below by the plaintiff in error in that regard, since the rights deduced from the admitted illegality of the transaction were placed solely on considerations of the local law of the State of Texas and of the State of Georgia deemed to be applicable to such condition of things or upon what was deemed to be the controlling principles of general law on the subject. Indeed, so absolutely is this the case, that, as we have seen, the Company itself insisted on the illegality and based rights upon it. And it was only on behalf of the defendant in error that considerations involving the full faith and credit clause were suggested as controlling the results in consequence of the admitted illegality of the transaction as a gambling one. A condition which is illustrated by the fact that the reply petition of the plaintiff, while accepting and reiterating the averment of illegality made in the answer of the defendant Company, in addition specially alleged that the illegality resulting from the gambling transaction caused the assignment of the policies to be void under the law of New York where the Company was organized and under the law of Texas, as well as under the law of Georgia. And it was for this reason that the proof which was offered as to the statute law of Georgia on the subject of gambling transactions and the decision or decisions of that State which it was deemed made the statute applicable were tendered on behalf of the plaintiff

and not by the defendant company. It would be indeed anomalous when the parties had both relied upon the illegality of the transaction upon grounds wholly independent of any Federal right and the case had been decided upon that ground, which in and of itself is sufficient to sustain the action of the court below, to permit one of the parties because of his dissatisfaction with the application of such principles to assert the existence of jurisdiction because the case rested on a Federal issue. It becomes hence obvious that the assignments of error outside of the one referring to the repugnancy to the Fourteenth Amendment of the statute imposing damages and penalties, affords not the slightest pretext for the exercise of jurisdiction and they therefore may be put out of view.

Coming to consider the latter subject it may not be doubted that the non-repugnancy of the assailed statute to the Constitution of the United States has been directly determined by this court in the cases upon which the lower court based its ruling. (*Fidelity Mut. Life Ass'n* v. *Mettler*, 185 U. S. 308; *Farmers' & Merchants' Ins. Co.* v. *Dobney*, 189 U. S. 301.) But it is said that as previously upheld the statute as construed by the state court contemplated a liability for the penalties or damages and attorneys' fees only in case there was a wilful refusal to pay and therefore those decisions have no application here since the statute as applied in this case enforces a liability against the Company in spite of its action in the utmost good faith, taken solely for the purpose of determining to whom it must pay the sum due, liability as to which was frankly conceded. But the deduction simply disregards the basis upon which the court below rested its conclusion and invites us upon a conception of injustice to commit a wrong by reviewing a matter of purely local concern which is not within our cognizance. We say this because clearly the court below rested its conclusion as to liability for the penalty and damages not upon the construction of the

statute suggested, but upon the premise that the payment to Hilsman by the Insurance Company of the sum of the policies under the circumstances stated was a payment which took it out of the category of a mere stakeholder seeking to discharge his duty in good faith and placing it in the position of a person espousing the cause of one as against the other and thereby subjecting himself to the legal consequences arising from such action. And the considerations which we have stated also dispose of the contention concerning the wrong which it was insisted was done in declaring the assignment of the policies void because of the gambling nature of the contract and yet permitting the assignor to hold on to the price paid for such assignment. That question was involved in and controlled by the court's ruling concerning the illegal nature of the transaction and the principles applicable thereto, and therefore it is beyond our competency to review.

As the repugnancy of the statute concerning the damages and attorney's fee was the only semblance of ground for invoking our jurisdiction and as that ground was conclusively established to be without merit when the writ of error was sued out, it follows that there is nothing upon which to base jurisdiction and the writ of error must be dismissed.

Dismissed for want of jurisdiction.